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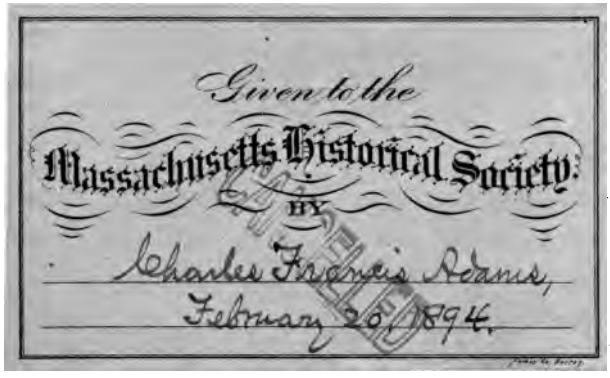
Given to the
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BY
Charles Francis Adams,
February 26, 1894.

THE MARK

IN

EUROPE AND AMERICA

A REVIEW OF THE DISCUSSION ON EARLY LAND TENURE

BY

ENOCH A. BRYAN, A.M.

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BOSTON, U.S.A.
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PREFACE.

BOTH the theoretical and the practical sides of the question of land-ownership have, of late years, occupied a prominent place in the discussions not only of economists, but also of that considerable number of persons who are interested in economic questions. An important chapter of this discussion is concerned with the historical development of property in land, and this has turned almost entirely on the theory of the Germanic Mark and its relation to communal ownership. The writer of this essay, during a year of rest from his regular duties, has been able to take advantage of the ample material afforded by Harvard University bearing upon the subject, and to make this small contribution to the further consideration of the problem.

The immense influence which the acceptance of the Mark theory must have, not only on economic thought, but also on practical legislation, and even on legal procedure, was probably not foreseen by those who promulgated it, but cannot but be apparent to one who will at the present day give it

careful consideration. Already the advocates of state ownership of land look upon it as affording that very necessary support to their scheme — an historical basis. At no distant day it may play a yet more important part in practical politics. It is this consideration which lifts the matter out of the region of mere antiquarian, or even theoretic interest, and places it within the range of those subjects upon which the intelligent reader wishes to be informed.

This volume presents, chiefly, a sketch of the history of the theory during the past forty years, and is not intended, primarily, as a presentation of the original documentary evidence, though the author has availed himself, so far as possible, of the original sources of information. The literature of the subject has become so voluminous, and covers such a considerable period of time, that it would seem now to be worth while to gather up the scattered threads and attempt a connected statement and criticism. The attitude, both toward the evidence and toward its discussion, preserved during the examination of the question was, in so far as possible, characterized by suspension of judgment. But the author is not one of those who believe that the scientific investigator must never reach a conclusion, or that indiffer-

ence is a test of accuracy, and hence he has not hesitated to give expression to his views on the bearing of the evidence. He has tried to avoid the error, into which some writers unconsciously have fallen, of balancing the judgments of others upon the evidence, and inclining with the majority of the judgments rather than with the weight of the evidence.

In dealing with the American evidence for the Germanic mark it was not deemed necessary to enter at length into any statement of historical facts. Those who have seen fit to attach so great an importance to supposed traces of the mark in the beginnings of American institutions, have made the public their debtor by bringing to light many interesting and important details in regard to the early settlements. The conscientious manner in which these have been gathered is deserving of all praise. But the question of the connection of the Germanic Mark with these, rests primarily, on the question of its existence, and secondarily, on the interpretation which is put upon the facts themselves. Hence, the present discussion has been confined largely to the interpretation of data which are the property of all.

While it cannot be hoped that this brief essay on the history of property in land will add much to the work of the historical school of economists, yet it

may help to indicate the growing interest in the United States in that broader view of economic questions which the new school has done so much to bring about. The economic history of recent periods, or, as it is sometimes styled, applied economics, has with us rapidly gained a prominent place among subjects of academic instruction. But the advantage which the study of earlier economic history derives from its larger perspective cannot fail to be observed; nor can we fail to see how the one is necessary to supplement the other, and how both are necessary to correct and render more real economic theory.

The author wishes to acknowledge his very great obligation to Professor W. J. Ashley, of Harvard University, for his counsel in the preparation of this volume. It is due to his encouragement that it is offered to the public.

CAMBRIDGE, MASSACHUSETTS,
May 25, 1893.

CONTENTS.

CHAPTER I.

PAGE

THE THEORY OF THE GERMANIC MARK 1

CHAPTER II.

NATURE OF THE EVIDENCE 20

CHAPTER III.

DISCUSSION OF THE EARLIER EVIDENCE 29

CHAPTER IV.

DISCUSSION OF THE LATER EVIDENCE 61

CHAPTER V.

SUMMARY 101

CHAPTER VI.

THE MARK AMONG SAVAGES; PREHISTORIC AND MODERN 109

CHAPTER VII.

THE MARK IN AMERICA 113

CHAPTER VIII.

THE MARK IN ECONOMIC DOCTRINE 141

I.

THE THEORY OF THE GERMANIC MARK.

AN historical hypothesis, though it may after a time prove untenable, possesses at any rate the merit of forming a central point for investigation and discussion. But there is a corresponding danger. If once it is fixed in the mind and accepted as standing for a reality, subsequent facts are interpreted in its light and then in turn, made to reflect light upon it.

Whatever may be the final word in regard to the essential truth of the theory of the Germanic Mark, it must be confessed that that theory has greatly stimulated investigation of the earlier economic and social conditions of the Teutonic race. Yet much remains to be done to complete the picture of our institutions from their simple tribal forms to the complex organizations of the present day. The mere mention of the date — 1848 — at which the theory may be said to have made its appearance, suggests alike its strength and its weakness. It was well-nigh inevitable that when Kemble, in that year, gave definite form to the "mark," he should

breathe into it the breath of freedom, and should throw over this creature of the distant past a veil of romance which some cold-blooded investigator must surely tear away. Still if the *thing* remains, the elements of fancy about it may well be forgiven. The same tendencies which prompted so attractive a theory secured for it a ready acceptance on the part of the public. When, in 1854 and subsequent years, Maurer[1] gave to the theory a more scholarly air and a more scientific aspect, all the elements necessary for its acceptance were present. And it did receive practically unquestioned acceptance for a third of a century, the whole force of scholarship in this direction being expended in elaborating, extending, and illustrating the theory from the starting point of Maurer's conclusions. There was no independent re-examination of the whole ground, Maurer's evidence with his interpretation of it, being not only accepted as conclusive but being also made the basis of a broader application of the theory. To a remarkable degree the theory fitted into certain great social movements and added to them the charm which Aeneas found in 'seeking again the ancient mother.' The social reformer

[1] Georg von Maurer, Einleitung zur Geschichte der Mark-, Hof-, Dorf-, und Stadt-Verfassung. 1854.

found in it the support which he needed. Democracy had the comforting assurance of precedent. The land reformer saw in it a solid foundation for his scheme for the amelioration of the race. The hope of the future seemed to be brightened by this reflection from the past. Loyalty to the cause of human liberty seemed to require adherence to the doctrine that that liberty was ancestral. The growing influence of the Germanists received support from and supported a theory which glorified the freedom-loving spirit of the race. Not until within the last decade has the inevitable reaction set in, and it is but fair to say, that the result of that reaction has rendered necessary a reëxamination of the entire field.

Nor can this examination be confined to the Teutonic peoples. For the writers who have followed Kemble and Maurer not only have discovered the existence of the mark in many other races, but also have seemed to suggest a new principle of institutional development — that the mark represents a phase through which the entire human race must needs pass.

Professor Nasse contented himself with applying Maurer's conclusions to England. While admitting[1]

[1] Nasse, Land Community in the Middle Ages. Translation, Cobden Club publication, p. 14.

that Kemble had not proved the existence of the mark associations in England, he gave a mass of valuable evidence in regard to the commonable fields, commons, and villages in England, the two-field and three-field systems of cultivation, and communal manorial customs, which, considering the persistence of agrarian systems,[1] in his judgment indicated the universal prevalence of the mark as the social unit in Saxon England.

Sir Henry Maine went further. Accepting the conclusions of Maurer, and of Nasse,[2] as established, without any reëxamination of the evidence in the case, he undertook to apply the comparative method to the problem; and in his *Village Communities in the East and West* (1871), he pointed out the resemblance of the modern village communities in India to the Teutonic Mark, regarding the former as a case of arrested development. In a later work, *Early Law and Custom*, he presented the bearing of the more recent Irish evidence upon the theory. Impressed with the wide-spread existence of certain phenomena among the Aryan peoples, and accepting

[1] "Agrarian relations have a tendency to a more lasting duration than any other human institutions." — Nasse, Land Community in the Middle Ages, p. 11.

[2] Maine, Village Communities in the East and West, p. 11.

the mark as demonstrated, he proceeded, with his accustomed candor and moderation, to construct a theory which should account for the transformation of the patriarchal family into the mark and the mark into the manor.[1] Other writers brought in new evidence until Celts and Scandinavians and Sclavs, Romans and Greeks and Hindoos as well as Germans were asserted to have passed through this stage at some period of their history. Viollet found the institution in ancient Greece; Jubainville in ancient Gaul; while Laveleye identified it with the *Mir*, which he regarded as the primordial cell of Russian society.[2]

But Laveleye and others have wished to show that the mark or village community was not confined to the Aryans, but was as wide-spread as

[1] Kovalevsky credits Maine with "having first brought to light the truth which is now all but established, that village communities represent a distinct period in the social development of mankind, a period which ought to be placed between the patriarchal and feudal periods, and that therefore all endeavors to explain their existence among this or that people by the peculiarities of national character ought to be henceforth declared useless and worthless." — Modern Customs and Ancient Laws of Russia, p. 72.

[2] "La commune est la molécule constitutive de la nationalité russe. . . . Seule elle est propriétaire du sol, dont les individus n'ont que l'usufruct ou la jouissance temporaire." — De la propriété et de ses formes primitives, p. 11.

the human race itself.[1] Savage tribes and prehistoric man were made to illustrate the universality of the institution. Mr. G. L. Gomme in *The Village Community* would place the English village community on this new basis.

A yet wider application for the village community theory was sought. It is represented as not merely a stage in institutional development; it is the natural form society will take if unhampered. For evidence was brought forward to show its reappearance on American soil, and the inference was not unfair that we were coming upon the traces of a principle deep-seated in human nature itself.[2] Re-

[1] "Aujourd'hui on peut démontrer que ces communautés ont ne existé chez les peuples les plus divers, chez les Germains et dans l'antique Italie, au Pérou et en Chine, au Mexique et dans l'Inde, chez Scandinaves et chez les Arabes, exactement avec les mêmes charactères. Retrouvant ainsi cette institution sous tous les climates et chez toutes les races on y peut voir une phase nécessaire du développement des sociétés et une sorte de loi universelle présidant a l'evolution des formes de la propriété foncière." — Laveleye, Prim. Prop., p. 2. Mr. G. L. Gomme, The Village Community, p. 3, says: "It must be reckoned with as one of the phases through which practically all mankind who have reached a certain stage of development must have passed."

[2] Maine, Village Communities, p. 138, says that evidences such as "the English settlement in North America lead me to think that assemblages of people planted on waste land would be likely to reproduce the system literally."

move the pressure of ages of oppression, give human nature free scope in a new world and forthwith the institution reappears. So broad was the application of the communal principle that the theory seemed to be degenerating into a restatement of the proposition that "man is a social animal."

It was inevitable that the general acceptance of such a theory should change historical perspective; and no one who is familiar with the pages of Green and Freeman is unconscious of the fact that it has done so. If Stubbs has shown more caution, he has none the less influenced the minds of his readers in the same direction. The economists, too, are not so wedded to abstract theory as not to yield to the influence of historical dogma, — witness the use which was made of this dogma in the land theories of so classic an economist as Mill, and such radical reformers as Laveleye and Henry George.

The desire for a clear understanding of the recent discussion of the subject must be our excuse for reproducing the familiar picture of the mark as drawn by the succession of writers who have given it form and coloring.

The mark, we are told, consisted of a definite area of land, and upon it an organized group of families

who owned, occupied and cultivated it in common.[1] It may be viewed in its territorial aspect, or in its political and economic. As a territory it was a tract usually separated from other similar tracts by waste lands. It was composed[2] of (1) the village area, divided into lots of equal size, which were assigned to the members of the community; (2) the arable mark (Feldmark), or arable land lying about the village in two or three fields and apportioned in holdings of equal size among the freemen; (3) the common mark, or pasture and waste land surrounding the arable, which was the common property of the community. Each family of which the mark organization was made up or rather each freeman, as the head and representative of this social unit, had an equal share[3] in the arable land and equal rights in the common mark. In the earliest times the allotment of this share was supposed to have been made annually by lot or otherwise. At a later period the allotment was made for a series of years; and later still this system of 'shift-

[1] Stubbs, Constitutional History, I. p. 53.

[2] Morier, Systems of Land Tenure in Various Countries (Cobden Club Pub.), p. 279. Maine, Village Communities, p. 78.

[3] "Jeder Genosse hatte gleiche Rechte an der Feldmark."— Maurer, Einleitung, p. 93. "Der Antheil eines jeden an den Gärten, Feldern und Wiesen ward dem selben zugemessen und man nannte den ganzen Antheil das Loosgut." — Ibid. p. 7.

ing severalties' gave place to permanent holdings. The ownership still continued in the community,[1] though the theorists regard this permanence of occupation as a step toward individual property.[2] But the community regulated the kind of crops and the mode of culture.[3] On the death of the holder his holding reverted to the community,[4] which allotted it again, — usually, it is true, to the family of the deceased. Pasture and woodland were enjoyed equitably by all members of the community under an officer elected for the purpose.[5] The members of the mark-community were freemen with equal political rights. Maine describes them as "an organized self-acting group of Teutonic families."[6] "The group," says Kemble,[7] was "a voluntary association of freemen amply competent to all the demands of society, who laid down for themselves

[1] "It is a strict ownersnip in common both in theory and practice." — Maine, Village Communities, p. 79.

[2] Nasse, p. 11. Maine, Village Communities, pp. 80, 81, 82.

[3] "In the common mark and the arable mark the individual is everywhere controlled by his peers." — Morier, System of Land Tenure, p. 281.

[4] "Nul n'y exercait un droit permanent et hereditaire." — Lavellye, De la propriété et de ses formes primitives, p. 77.

[5] Maine, Village Communities, pp. 79, 99.

[6] Ibid. p. 10.

[7] Saxons, I. p. 53.

and strictly maintained a system of cultivation by which the produce of the land on which they settled might be fairly and equally secured for their service and support." And again, "The markmen, within their own limit, were independent, sufficient to their own support and defence, and seized of full power and authority to regulate their own affairs." Together the freemen constituted the legislative body; together they composed the common court; together they exercised a common proprietorship over the entire mark. Every freeman[1] had an equal voice in the common courts and councils. Maine describes the manorial group as succeeding a "group of households of which the organization and government were democratic."[2] It was a pure democracy practicing a strict agrarian communism.[3] But along with this aspect of the freeman as "commoner," it must be remembered that he also exercised the functions of "lord."[4] Within his own home and house-yard he

[1] Green poetically describes him as "the free-necked man whose long hair floated over a neck that had never bowed to a lord." Making of England, p. 173.

[2] English Village Communities, p. 134.

[3] "The typical principle of the Teutonic law was 'the land held in common.'" Kemble, Cod. Dip. Intro., p. iv.

[4] Morler, Land Tenure, p. 281. Maine, Village Communities, p. 84.

was supreme.[1] Even if we can not agree with Sir Henry Maine that the power of the freeman in his own household was practically the 'patria potestas,' yet he had undisputed control of his house, his family, and his servants; and it is worth while to note that we have thus co-existing the extremes of despotic patriarchal government in the family and of democratic government in the community.

The mark is presented to us as a fundamental institution of the Teutonic race. Kemble says, "This is the original basis upon which all Teutonic society rests."[2] And again, "However far we may pursue our researches into the early records of our forefathers, we cannot discover a period at which the organization was unknown."[3] According to Maurer, "The associations of the mark are bound up with the primitive cultivation of the soil; they can be traced back to the earliest German settlements, and in all probability once occupied the whole of Germany."[4]

[1] "Von jeher war nämlich der freie Germane in seinem Hause und in seiner Familie sein eigener Herr." — Maurer, Einleitung, p. 239. Maine, Ancient Law, p. 138; Early Law and Custom, p. 57.

[2] Saxons, I. p. 53.

[3] Ibid. p. 37.

[4] As quoted by Fustel de Coulanges, Mrs. Ashley's translation, Origin of Property in Land, p. 4. In Maurer's theory, of course, provision is also made for single farmsteads. But he regards these as comparatively unimportant.

Maine declares that "it is well known to have been the proprietary and even political unit of the earliest English society." [1] And again he refers broadly to "countries like Germany and England, where the cultivated soil was in the hands of free and fully organized communities." [2]

The mark has not been presented to us as existing alongside of other political and territorial institutions, but as the fundamental institution out of which or upon the ruins of which later institutions arose.[3] Yet it is not an institution of the savage or nomadic nor even of the pastoral stage. It is a phase of economic development succeeding these, and of political development succeeding the strictly patriarchal and tribal forms of society. It is, of course, closely connected with these; but the tie which binds the members of the community together is territorial and no longer that of kinship.[4]

[1] Village Communities, p. 10.

[2] Ibid. p. 132.

[3] "Every Teutonic community has been evolved out of a germ identical in its rudimental construction with that of every other." — Morier, Systems of Land Tenure, p. 243. "The original Teutonic community is an association of freemen, a 'Gemeinde,' a commonality or common."

[4] "From the moment when a tribal community settles down finally upon a definite space of land, land begins to be the basis in society instead of kinship." — Maine, Early History of

Local contiguity, and finally the area of land occupied becomes the basis of the group. It is explained that from the earliest settled agricultural state Teutonic society assumed the territorial and political aspects set forth by the mark theory; and that it continued under this mode of organization until through internal and external influences the mark became the manor, the town or the city, and private property in land became the rule. By war, by the abuse of official trust, and by the encroachments of the powerful, wealth and power accumulated in the hands of a few, and the feudal system became dominant. It thus became a favorite problem of constitutional and economic historians to determine "how the mark became the manor." The popular theory[1] was that some social earthquake,

Institutions, p. 72; cf. also Allen, Monographs, p. 233. "The original Teutonic community is an association of freemen amongst whom the private right of property in land is correlative to the public duty of military service and participation in the legislative and other political acts of the community." — Morier, Land Tenure, p. 279. "The tie of blood, however, was widened by the larger tie of land." — Green, Making of England, p. 184. "The cement binding the whole group has practically changed from kinship to land." — Gomme, p. 64. Howard, Local Const. Hist. U. S., emphasizes *kinship* in the mark. Vol. I. p. 14.

[1] "Mr. Blamire appears to have unreservedly adopted the popular theory on the subject, which I believe to be that at

such as the Norman conquest in England, had overthrown this communal and democratic organization of society, and had imposed on the free village community a regime of private property in land and feudal despotism. It was asserted or implied that the entire soil was confiscated and the freemen reduced to serfs. But modern science looks with doubt upon theories which rely upon sudden and great disturbances to account for phenomena, and another theory, more in accordance with modern views of evolution, has become generally accepted, viz., that the mark had within itself the germs [1] of the feudal

some period — sometimes vaguely associated with the Norman conquest — the entire soil of England was confiscated; that the whole of each manor became the lord's demesne; that the lord divided certain parts of it among his free retainers, but kept a part in his own hands to be tilled by his villeins; that all which was not required for this distribution was left as the lord's waste; and that all customs which cannot be traced to feudal principles grew up insensibly through the subsequent tolerance of the feudal chiefs." — Maine, Village Communities, p. 84. It is well known, however, that this was the generally accepted legal theory.

[1] "In England before the Norman conquest the Feudal *System* most certainly did not exist. There was no systematic feudalism, but the elements of feudalism were there." — Freeman, Norman Conquest, I. p. 91. "By these means (such as the conquest) the old system of the free Teutonic community gradually died out in England, as it died out in all parts of the continent." — Ibid. I. p. 96.

system, that the change came slowly under the influence of internal forces and was only hastened by external forces.[1] Possession of the house-lot in the village mark first hardened into property; then the permanent allotment in the arable;[2] last of all the common mark became private property, through continued encroachments of a lord or its seizure by the king. But whether the change came from within or without, the end was the same, viz., the destruction of the liberty of the masses, the robbing them of their common right to the soil, the substitution of private ownership of the land by the lord for community of ownership by the people. But the old order had left its traces deep in the soil, and in the methods of cultivation, and in the communal rights, usages and laws of the people.

Let us ask ourselves now what are the essentials of this theory of primitive Teutonic society.

First and most important is community of property. The theory on this point is not always clearly stated. At one time the land is said to be owned by the entire village community; again it is alleged that

[1] Maine, Village Communities, pp. 84, 132, 145.

[2] "Private property first came into vogue with arable land." — Nasse, Land Community in Middle Ages, p. 11.

there is no ownership, merely undisputed possession by it as an organized group. The manner of statement matters little; in all cases ownership or possession is communal, and private property is non-existent. It must not be forgotten that this ownership by the mark is distinctly different from family ownership. It represents a different stage from that in which the family is the proprietary unit. It is true that, according to the theory, holdings are distributed to the families as represented by their heads, the freemen. But the ownership, if such it may be called, remains with the community. Nor is it the same as joint ownership. The mark was not a company of which the individual markmen were the members and of whose property they were co-proprietors. The units of which the mărk was composed became vested with no proprietary rights which they might sell, donate, or bequeath. When the holder of a portion of the arable and rights of common died, the holding reverted to the community and was again allotted.

The second essential feature is that of freedom and self-government. Slavery may have existed, but the mass of the people were free.

The third essential feature is the substantial equality of the markmen. All members had

equal political rights and privileges. And it was the equality of sovereigns. Together they made the simple laws and administered the simple justice which such a state of society required. The same equality extended to the holdings of land and rights of pasturing stock and feeding pigs and gathering wood in the forest. The manifest and intentional tendency of this arrangement was toward equality of possessions and social standing, though some writers have admitted that there were grades of wealth and rank.

Teutonic society, then, began in free self-governed communal organizations whose members enjoyed a substantial equality: it did not begin in serfdom nor under a regime of individual ownership of land. What strikes one at first in this theory, apart from a certain air of artificiality, is its resemblance as a scheme of social organization to certain conceptions that had once been thought the product of a later age. Its democracy, its individualism, and to a certain extent its communism are very like nineteenth century ideals. The next thing that impresses one is its unlikeness to what preceded and what followed it. Succeeding the despotism of the patriarchal family and preceding the despotism of the feudal lord is a long period of democratic gov-

ernment. One thinks of the geologist's "dike," where through the fissure in the stratum there has been thrust a vein of mineral of another kind. Even during the existence of the village community in its typical form there is a striking contrast between the ideas which prevailed in the family and those which are associated with the mark. Within the family, ownership is centered in one, the head, and ideas of personal subjection and slavery are dominant; within the mark, ownership is absent, and perfect freedom and equality reign. Yet, Sir Henry Maine has assured us that there were in the patriarchal family inherent tendencies toward such an institution as the mark, and that there were in the mark *'ineradical'* tendencies toward feudalism.[1]

If one were asked during what period, among Teutonic peoples, this institution existed, it would be impossible to answer definitely on the authority of those who have introduced it into our history. Yet one might say broadly, from the first permanent occupation of a definite area of land by the Germanic tribes, previous to the times of Tacitus and Caesar, down to the Norman Conquest. While it has been asserted that many of its striking features had ceased

[1] Ancient Law, p. 130. Village Communities, pp. 21, 130.

to exist long before that date, yet many projected themselves far beyond it.

In endeavoring thus to gather up the elements of the mark theory and to present it with definiteness as to form and time, there has been given to it a certain artificiality which it did not have in the minds of those who have written upon it. Yet it seemed impossible to form a clear and faithful picture which should be wholly free from this fault.

II.

NATURE OF THE EVIDENCE.

NOW let us inquire upon what evidence the theory of the Teutonic mark was based. It is of two kinds, (1) documentary, and (2) that to be found in the soil itself and in the local usages and laws of communities existing at the present day. Or perhaps we would better divide it into the earlier and the later evidence; the former being wholly documentary and covering the period, roughly speaking, from Caesar on down well into the middle ages; the latter covering both the later documentary evidence which might throw light upon early conditions, and the survival in the soil itself, such as open fields and commons, and in local law and custom, of the earlier order of things. It is legitimate to regard these as the debris of an ancient system and from them to reconstruct that system.

The earliest documentary evidence is found in the meagre descriptions of Germany and the Germans given by Caesar and Tacitus, the latter writing at the end of the first century and the former a hundred and fifty years earlier. As this is the

earliest evidence, it is of great importance, since the interpretation of the later evidence will be affected by the mental picture formed of the conditions there described. A blank of three centuries follows where no evidence for or against the theory is to be found. From the 5th century forward light is thrown upon the continental conditions by the laws of the various Germanic and Frankish peoples, and by the whole body of charters and similar documents from the 8th century onward; while on the English side we have chiefly the evidence of the remnants of Anglo-Saxon Law from Ethelbert forward, and the collection of Anglo-Saxon charters and documents from the 7th century till the Conquest. The same body of evidence is to be appealed to by those who seek to establish and those who deny the existence of the Teutonic mark. It was to this Maurer appealed, and it was in the light of this that he interpreted the later facts. It might be remarked that his immediate followers, so far as the earlier evidence is concerned, trod in his footsteps, turning neither to the right hand nor to the left.

The later evidence is much more abundant. There is abundant material in regard to the village communities of the 11th and 12th and later centuries. On the English side there is no lack of documents from

Domesday onward, through manorial 'extenta,' parliamentary rolls, court records, ecclesiastical records, manorial accounts, chroniclers, law books, etc., and in more recent times in the enclosure acts and the transactions of commissions under them; and finally there are proofs of an earlier and different order of things which are left on the soil and in the enjoyment of certain communal rights and privileges. In judging of this evidence allowance must be made for the "personal equation." Here as elsewhere one is likely to see what he expects to see. If one approach the evidence with the mark in his mind he is apt to find the mark in the evidence.

The dangers of the method of reconstruction from historical remains, just referred to, have been so frequently pointed out, even by those who have straightway fallen into them, that it is scarcely worth while to suggest the careful scanning of the inductions so made. The common enjoyment of privileges, joint labor, equality in the size of holdings, coöperation in cultivation, the mutual helpfulness of neighbors, are not sufficient grounds for the induction of communal ownership and equal and sovereign political rights. Every log-rolling, house-raising, corn-husking, apple-paring and wool-picking that has taken place in America cannot be taken as evidence of the pre-

existence in the Anglo-Saxon race of the Germanic mark. The "ye-ho-ho" of the negro roustabouts on an old Mississippi steamer, as they tugged together at the line, was a good example of community of action and of a certain equality, but was proof neither of freedom nor of the common ownership of anything. In truth, the best example of equality and of community of cultivation that has been witnessed in America was to be seen on the great southern plantations before the civil war.

On the other hand it is not sufficient proof of the absence of political freedom to show the existence of wealth and rank and the dependence of the poor. It is not quite proof that men were bound to the soil as serfs to be assured that they were virtually unable to move from place to place, and were virtually at the mercy of the rich and powerful. All these may be found to-day, among those who are supposed to possess a high degree of political freedom and political equality. Indeed the question seems too sharply put when it is stated, "Did Teutonic civilization have a free or a servile origin?" as though the whole truth must lie in the one or the other of these two words. To answer categorically the question, 'Were our ancestors serfs, or freemen?' we must inevitably modify our conceptions of the terms.

With this statement of the mark theory, as almost universally accepted, and with this caution with regard to the evidence bearing on the case, we are in a position to apply ourselves to the more recent discussion of the theory. This is of two kinds: that which aims directly at supporting or attacking the theory, and that which simply seeks to discover the economic and political conditions of the period involved, regardless of its bearing upon any particular theory. The two methods cannot be wholly separated; both aim at the same end and are, for the most part, conducted in the same spirit. The grave doubts cast upon the theory by the first method naturally led the way to the second.

From two directions and almost at the same time, and yet without any concert of action, came the attack upon the mark theory, as propounded by Maurer and his disciples. And yet we seem to misrepresent the admirable attitude of these investigators by describing their work as an attack.

These lines of approach correspond to the nature and method of the evidence adduced in its support. The one line was from the earliest period downward, and dealt exclusively with the documentary evidence during the supposed existence of the institution; the other was from the present upward toward the

sources, from the known to the unknown, and dealt with the evidence yet remaining in the land and people, as well as in the abundant documents covering the period since the mark was supposed to have been overthrown by feudalism. The two lines met and formed one. It is not overstating the results of this work to say that it necessitates a newer and truer statement of the social and economical development of the race.

The two names which stand as representatives of the two lines of attack upon the mark theory are M. Fustel de Coulanges and Frederick Seebohm. Both brought to the task an eager zeal to discover the exact truth, and the results of patient and inexhaustible research and vast learning. The former is sharper and more controversial in his method, and gives one the impression of making a more critical analysis of his text than the author of the text made when writing it. The latter is conservative, cautious, sometimes almost over-prudent in stating a conclusion.[1] Though Seebohm's work was published first,

[1] An example of this caution is to be seen in his argument in regard to the open field system in England and in Germany, which has led some to suppose that Seebohm assigns a South German origin to the Saxon settlers of England. Cf. Prof. Ashley's Criticism of Andrews' "Old English Manor," Pol. Sci. Quarterly, March, 1893.

we will speak first of that of M. Fustel de Coulanges, since that deals with the earlier evidence.

It was twenty-one years after the appearance of the *Cité Antique*, itself a work of profound scholarship, that M. Fustel de Coulanges gave to the world the results of his investigations on the alleged primitive agrarian communism of the Teutonic race. Some hints of his attitude on the question had previously appeared in the reviews, but it was not fully understood until in 1885, when the "*Recherches sur quelques problèmes d'histoire*" was published. Nineteen years, he informs us in the preface,[1] had been devoted to the study of the feudal regime, following the same methods which he had employed in the twelve preceding years in the study of the Greek and Roman constitutions, and his works certainly display a marvelous acquaintance with the mediæval documents. We are informed[2] that he had studied pen in hand all the Latin texts from the 6th century, B.C., to the 10th century, A.D. Filled with the true spirit of the scientific method,[3] and impressed with the fundamental importance of

[1] Preface, p. 1.

[2] Elton, English Historical Review, 1890.

[3] "Mais j'ai toujours cru que le commencement de la science historique était de douter, de vérifier, de chercher."—Recherches, p. 189.

an understanding of the primitive conditions as to the ownership of land[1] in order to a clear comprehension of the social and political constitution of the people, he set himself to the task of a minute survey of all the documents which might throw light upon the subject, and the formation of a judgment upon the whole, not merely upon isolated parts of texts, which, while they might strengthen a position could not contribute ultimately to the advancement of historic science. In the *L'Alleu et le Domaine Rural* (1889), the author attempts a more constructive study of the history of institutions.[2] In a long article contributed to the *Revue*

[1] "En tout temps et en tout pays, la manière dont le sol était possédé a été l'un des principaux éléments de l'organisme social et politique." — L'Alleu et le Domaine Rural, Introduction, p. iii. "La possession du sol n'est jamais une chose isolée. La propriété est un fait social que dépend d'autres faits sociaux et dequel ceux-ci dependent." — Recherches, p. 248.

[2] Glasson has attempted to reply to certain strictures upon him made by Fustel in this volume, relating more particularly to the village community and communal land ownership in ancient France, in a volume entitled *Communaux et le domaine rural a l'époque Franque.* M. Glasson regards the abundant evidences of private property as due to the Roman influence; and he contends, without, however, adducing any evidence, that the language of the texts implies the presence of the free self-governed village communities, and seems to believe that these are the typical forms of social organization, and that they slowly gave way before Roman power and Roman ideas.

des questions historiques, for April, 1889, he sets forth in a more condensed form the substance of his investigations in regard to the Germanic mark — an essay which has been recently given to us in English dress under the title of "The Origin of Property in Land." [1]

[1] Translated by Mrs. Ashley, with an introduction (summarizing M. Fustel's conclusions and applying them to English history), by Professor Ashley (1891, 2d ed. 1892).

III.

DISCUSSION OF THE EARLIER EVIDENCE.

LET us now look at the earliest evidence. And since Tacitus describes the Germans more at length than Caesar, let us begin with him. It would aid us greatly in estimating the value of the evidence from Tacitus if we knew the exact sources of information upon which he bases his description; whether this part was from actual observation, that part from Caesar, and the other from travelers' tales. But that is out of the question, of course, so we can only assume that his information on the whole had a certain degree of exactness. The question then for us to consider is, "Does Tacitus present to us the Teutonic mark? Do we find in his writings, supposing them to present correctly the facts in the case, the picture of a social organization characterized by democracy, equality and agrarian communism, such as we have been told was the fundamental institution of Teutonic society?" Taking the description of Tacitus as a whole, one must admit that he does not find such a picture of "primitive democracy." Kings, chiefs,

priests, nobles, freemen, freedmen, serfs, and slaves appear on every page of the description.[1] Rank and noble birth are held in high honor, and are used as the means of acquiring more power ; moreover, among the followers of those who have been selected as chiefs on account of their noble birth there are gradations of rank.[2] Indeed it is true, as one of the advocates of the mark theory has been constrained to admit, that "as far as the eye can penetrate into the gloom of the earliest traditions, blood is privileged."[3] Not only does Tacitus reveal to us the existence of a slave class, but he tells us that freemen may become slaves,[4] and slaves may become freedmen. Slaves may be sold,[5] or bequeathed.[6] The freedmen, we are informed, do not rank much above slaves.[7] Then he gives us a glimpse of a slavery, which presents a remarkable

[1] See Germania, §§ 5, 7, 10, 11, 12, 13, 14, 15, 25, 32, 44, 45, 46. "Reges ex nobilitate, duces ex virtute sumunt." — Germ. 7. "Insignis nobilitas . . . principis dignationem etiam adolescentulis assignant." — Germ. 13. "Sed ob nobilitatem." — Germ. 18. "Inter obsides puellae quoque nobiles imperantur." — Germ. 8.

[2] Germ. 13.

[3] Morier, Local Government and Taxation (Cobden Club), p. 362.

[4] Germ. 24.

[5] Ibid. 24.

[6] Ibid. 25.

[7] Ibid. 25.

likeness to serfdom of the Middle Ages.[1] After speaking of the slaves that are bought and sold, he says, "They do not use the rest of their slaves like ours, in various employments in the family. Each slave controls his own house and home." And then he goes on to tell us that he renders to his lord grain, cattle, and cloth — payments in kind just as we find at a later day. Now what proportion did these slaves, serfs and freedmen, with their families, bear to the whole population? We do not know. No doubt they were a large and growing class. We are able to infer that the cattle raising, and the tillage — indeed all agricultural and domestic labor — was in their hands; and that their number would be likely to increase faster than that of their masters, whose occupation was war. For, note the character of the noble freemen.[2] "When they are not engaged in war, they pass their time less in hunting than in sluggish repose, given up to eating and sleep, each bravest and most warlike one doing nothing, having committed the care of his house, his family affairs, and his land to the women, the old men and to the weaker domestics." Now fill in the picture of this warrior freeman, with his house and his land, his slaves and his serfs, and, in case he be of great

[1] Germ. 25. [2] Ibid. 15.

rank or prowess, a following of freemen warriors who have devoted themselves to his service. Can this be fitted into an ideal Teutonic mark? It is to be remembered, too, that this section is not describing the German war chief, but the ordinary German freeman.

Tacitus describes a regime of private property, — at least in movables. Barter, gifts, fines, and inheritances are evidences of this. "Wealth, too, is honored among them."[1] The war chiefs are distinguished by presents,[2] and are expected to bestow costly presents on their followers,[3] which would not be possible except on condition of the possession of great wealth. Such wealth, of course, consisted largely of the booty taken in war. It may not be possible to *prove* that there was ownership of land, but the evidence points very strongly in that direction. It is mentioned as a remarkable and exceptional fact that there is a certain class of men among the Chatti,[4] who wear long hair and devote themselves to war, "to no one of whom is there a house, or an *ager*, or an occupation," and who live off their fellow tribesmen. Notice that the *ager* is put in the same category as the house. Whatever it was,

[1] "Est apud illos et opibus honos." — Ger. 44. Cf. id. 21.
[2] Germ. 13. [3] Ibid. 14. [4] Ibid. 31.

it was supposed to belong to a single individual. Again, in section fifteen, we are told that "the care of his house and his penates and his *agri*" [1] had been left by the freeman to the women, old men and servants. Whatever the *agri* were, they belonged to a single individual. In another section [2] certain men are spoken of who worked, or, as we should say, farmed the Decumate *agros*.[3] The forty-sixth section tells us of the Fenni, the most savage and poverty-stricken of all the Germans, who live like wild beasts. And yet, says Tacitus, they think themselves happier than those who "groan over their *agri*, toil over their houses, and place their own fortunes and those of others between hope and fear." The other cases in which Tacitus uses the word *agri* in the Germania we will mention presently. The evidence which these illustrations offer of the ownership of land is strong, but stronger still is it when woven into the whole structure of wealth and rank and power which the entire description of Tacitus presents. The predominating influence of the chiefs in public concerns is clearly set forth.[4] In some

[1] "Domus et penatium et agrorum cura."

[2] Germania, 29.

[3] Lands in S. W. Germany along the Rhine, lately assigned by the Romans to colonists on condition of a payment of the tenth, whence their name.

[4] Germania, 11.

cases, the rulers rule without any restriction.[1] Nor are all the chiefs elected by a popular vote. They gather about them a personal following. It is not the vote of the whole body of freemen that makes any man a war chief; it is his winning the admiration and attachment of single followers; and it is the free choice of the single follower that makes him a follower.

If this is the condition of things which Tacitus reveals to us, where is the evidence for the mark? It is found almost exclusively in the interpretation of the few well known and much discussed lines, "*Agri pro numero cultorum ab universis in vices occupantur, quos mox inter se secundum dignationem partiuntur; facilitatem partiendi camporum spatia praestant. Arva per annos mutant; et superest ager.*"[2] Maurer says that *ager* meant *ager publicus*,[3] public lands; and that that meant the mark which was owned by all in common. If Tacitus had meant *ager publicus*, he would have said *ager publicus*. Tacitus uses *ager* in the Germania six times.

[1] Germania, 44.

[2] Ibid. 26.

[3] Maurer, Einleitung, p. 84: "Tacitus nennt dieses ungetheilte Land *ager*, das heisst wohl *ager publicus* im römischen Sinne des Wortes. Im Norden Europas nannte man es sehr richtig die Gemeine; das heisst, ungetheilte Mark oder auch das Gemeineland."

We have already cited the other four, in no one of which it could possibly mean *ager publicus*. In all of them it plainly means an individual property. If we were to substitute our American word "farm" in each of the four cases, there would be no jar in the sense. Nor would there be here in thus rendering *agri*.[1] But whatever may be the rendering of this much disputed passage, there is no proof in the text of communal ownership. There *is* proof of inequality among the persons, *secundum dignationem*, and in the possessions, *agri*, which each received. There is no proof in the text, nor anywhere else in Tacitus, of annual allotments. There is no proof of common cultivation by a free village community. It must be confessed, that, notwithstanding the disputed meaning of the passage, it hardly required on the part of Fustel de Coulanges the citing of thirty passages from Cicero, besides passages from Cato, Varro, Livy, Columella, and the jurisconsult Ulpien, to show that Maurer's rendering *ager* as *ager publicus* — common land — mark, was unwarranted.

[1] Perhaps it means something like this: "*Agri* are occupied in turn by the whole body of cultivators, in proportion to the number of cultivators;" that is, the more cultivators, the more *agri* are occupied. "Forthwith they divide these (the *agri*) among themselves according to rank or dignity," i.e. those of the highest rank get the choicest *agri*.

Its use by Tacitus himself would have been sufficient. More important than this negative criticism is the positive evidence he adduces for the use of *ager* for private estate,[1] a position which might have been strengthened by the citation of its use in the Germania already referred to.

The picture, so far as cultivation is concerned, which is presented to our mind by the passage, "*arva*[2] *per annos mutant*," "they change the cultivated lands in the course of years," is quite similar to that which was to be observed in the southern states in the earlier part of this century. It was a necessary incident of the "extensive" cultivation in which the proprietors of great estates with their gangs of slaves "cropped" one piece of land till it was exhausted, and then, in the course of a few years (*per annos*), changed the cultivation to fresh ground, throwing out the part previously cultivated, as "old fields."[3] Among the Germans land was plenty (*superest ager*), they did not cultivate deeply,

[1] Researches, p. 105. Origin of Property in Land, p. 7. Mr. Denman Ross also takes a similar position in regard to the use of *ager*. See Early History of Land Holding Among the Germans, p. 4, and elsewhere in Mr. Ross's writings.

[2] "Arva" is used in contrast with "ager."

[3] It is not intended to imply that the "picture" formed is that of estates worked by slaves, but merely that the system did not permit the permanent cultivation of the same area.

nec enim cum ubertate soli labore contendunt, and in consequence did not continue year by year to cultivate the same arable land. Even if *per annos* is to be read "every year," [1] there is no reason to suppose that they *exchanged with each other* the areas cultivated, in the face of the fact that land was so abundant, but merely that they gave one piece of land a rest while they cultivated another. The language is certainly not that which would have been used if it had been meant that they exchanged cultivated strips with each other.[2] The translation of the entire passage, "*Agri pro numero*," etc., is sufficiently difficult and unsettled, but it does not seem possible to *prove* either annual allotment, joint cultivation, communal ownership of land, equality among the members of the community, or even the existence of the mark itself from evidence so scanty and so uncertain in meaning.

Certainly the entire picture of Tacitus, with its slavery, its serfdom, its inequalities of rank, wealth

[1] Tacitus makes frequent use of the expressions "per singulos annos," "singulos per annos," "in singulos annos," when he means "every year." Such an expression, or "quotannis," he would doubtless have used here had he meant annually. As the years go by they shift the arable to fresh ground, is evidently what is meant. Cf. also Caesar's use of "in singulos annos" when he means annually. — De Bel. Gal. VI. 22.

[2] Tacitus would at least have used "*inter se*."

and power, lacks the elements of freedom, self-government and equality which we have been led to expect in the mark. Neither the communism nor the simple democracy are borne out by the texts. It is not pretended that there was no democratic element in early German society. There was such an element. Yet that society was permeated with inequalities. Under the free was a servile cultivating population, how great in numbers we do not know. There is no proof of the absence of property in land. On the other hand, the very absence from Tacitus of pointed explanation of so remarkable a difference from the Roman system as the non-ownership of land would be, the spirit of the laws in regard to inheritance among the Germans, together with divers minor hints in the text itself, render it strongly probable that, as soon as the tribes settled down to a regularly agricultural life, there existed private ownership of land, or at least the permanent possession of a more or less definite area which its owner either cultivated himself or by means of a group of servile dependents. Indeed, that scholarly critic, the late Prof. W. F. Allen, of the University of Wisconsin, who accepted the mark theory, was forced to admit[1] that it had not been proved that the mark was to be found in Tacitus, —

[1] Monographs, p. 229.

in fact that it did not exist in Tacitus' time, though he was of opinion that it came into existence soon after.

Nor, if we turn to Caesar a hundred and fifty years earlier, do we find it there. It is hardly possible so to interpret Caesar's brief sketches of what he saw and heard of the Germans along the border, as to find there the mark. Whether it be in his descriptions of Ariovistus and his followers, who boasted[1] that they had not been under a roof for fourteen years, or in his description[2] of certain tribes in perpetual war, of which one part is put to raising crops one year and the other sent to war, exchanging places for the next, or in his description[3] of the chiefs arbitrarily assigning lands and "compelling" the tribes to move from place to place, there is no hint of the democratic simplicity of the mark theory, nor of a settled agricultural occupation or ownership of a definite area of land; but there is a picture of

[1] De Bello Gallico, Lib. I, § 36.

[2] Id. Lib. IV, § 1.

[3] Caes. De Bel. Gal. II, 22. "Neque quisquam agri modum certum aut fines habet proprios; sed magistratus ac principes in annos singulos gentibus cognationibusque hominum, qui una coierunt, quantum et quo loco visum est agri attribuunt, atque anno post alio transire cogunt." It is to *tribes* and *clans* that lands are assigned. Here is the essence of arbitrary government. The chiefs and magistrates *assign* what they please and *compel* obedience.

unsettled tribes engaged in perpetual war. They were "just emerging from a nomadic condition, since they had not secured settled homes," as Cunningham puts it.[1] They were still in the tribal state. It is obvious that the mark which we have been looking for is not in Caesar.

If we do not find this group of self-governing freemen, endowed with equal rights and enjoying a common and equal possession of the soil, in Caesar and Tacitus, neither do we find it in the next three centuries, for they are as barren of proofs of its existence as of its non-existence. Evidences of its existence must next be sought in the body of German law. But it is precisely in this and in the other documents of the succeeding centuries that abundant proof of the existence of private property in land and landed estates, with a dependent population of cultivators upon them, is to be found; while the evidence for the non-existence of a self-governed group practicing communal ownership of land is correspondingly strong. The advocates of the mark theory, as M. Fustel points out, have placed great stress upon the existence of the *word* "mark," and yet they are able to cite no document

[1] Growth of Eng. Indust. and Commerce, I, p. 26.

in which it means a territorial group earlier than the 12th century. They argue from the use of the word in the 12th and following centuries that many centuries earlier, that word must have been used to describe a self-governing communal organization.[1] "And yet," says M. Fustel, "if we seek in the ancient writers of the first centuries of the Middle Ages, a phrase which tells us that the inhabitants of every village held a territory in common, or any similar phrase, we shall not find it."[2] The advocates of the theory would perhaps not be disposed to deny, what is undoubtedly true, that the primary signification of the word was a sign, mark, or boundary. In all the earlier texts it is thus used to distinguish objects possessed by one person from those possessed by another, the boundary line or limits of governments or estates. It is used as an exact synonym of *terminus*.[3]

[1] "Les auteurs ne citent aucun texte antérieur au douzième siècle, mais tout leur système est fondé sur ce raisonnement; Les textes du douzième siècle et des époques suivantes montrent que la *mark* est une terre indivise entre les habitants d'un village; or ce mot *mark* est tres ancien dans la langue germanique; donc l'indivision de la *mark* est infiniment ancienne." — Recherches sur quelque problèmes d'histoire, p. 322.

[2] Recherches, p. 321.

[3] Thorpe, who, by the by, does not seem to have suspected the existence of the mark community, gives the same explana-

M. Fustel calls attention to the fact that in the earliest place in which the word is cited (by Sohm) viz., the Edict of Chilperic (anno 574) it is on a supposition that the word *marias* of the text should read *marcas*, and that it should be translated "the associates of the mark"; and that in the first place where the word actually does occur, viz., in a Latin text of 581, it means the frontier of a kingdom.[1] From the boundary line of a country it came to mean the region of country lying along the border, as its later use in such expressions as the "marches of Spain," "the marches of Scotland." Like the words *finis* and *terminus*, from meaning the boundaries or limits of a province, or a private estate the

tion of the word so far as the early English evidence is concerned (Thorpe, Ancient Laws of England, I, pp. 33, 34). Earle, after an extensive study of Anglo-Saxon documents, confirms this point of view. He says, "The word *mearc* occurs repeatedly in the documents, but never in the sense of the area of occupation, still less in the political sense of the occupying community. What Kemble calls its restricted and proper sense of boundary is the only sense it bears in our records" (Earle, Land Charters and other Saxonic Documents, 1888, Introduction, p. xlv.).

[1] For a long time the word continued to be used in this sense. A good example is cited in the Recherche, p. 330. A capitulary of 811 is cited, "Let them know that the boundary (marcam) is at the Elbe — Let them know that the Pyrenees is their boundary line (marcam)." — Recherches, p. 325.

word *marca* came to be applied to the estate enclosed within these limits.[1] In the 8th, 9th and 10th centuries the mark is the same as the villa.[2] It belongs to a single owner or sometimes jointly to two or three owners. It consists of cultivated fields, meadows, woods. It has a servile population upon it.

It was the purpose of M. Fustel de Coulanges to show that neither the word mark nor any synonymous word is used in that sense in any of the documents, that the words *communia* and *allmende* in the texts have a different sense from that assigned to them by the theory, that all the documentary evidence fails to furnish proofs of the existence of a self-governing communal organization, and that the whole of the evidence proves that they did not exist.[3] If the *thing* existed some trace of it ought to be found in early German Law. It is not found, M. Fustel declares, in the law of the Visigoths,

[1] Fustel cites an example from the Diplomata (ed. Pardes.) II, 442, in which it is said that the mark (*marca*) Gerlaigoville, in Alsace contains a house, eight acres of arable land, some meadow and some woods, and all was the property of a woman named Eppha, who had received it as a dowery. — Recherches, p. 337.

[2] Recherches, p, 340.

[3] Cf. Origin of Property in Land, Introduction, p. xix.

nor in the law of the Lombards, nor in that of the Thuringians, nor in that of the Frisians, nor in that of the Saxons, nor in the Salic Law.[1] The *word* marca is found in the law of the Alamanni and in that of the Bavarians; but here it is an exact synonym of *terminus* and is used interchangeably with it. The Bavarian Law mentions a dispute between two neighbors who have a common boundary and calls them com-marcani, which Maurer thought must mean the co-markmen of which he tells us elsewhere,[2] but a little later on in the same law we are told that each disputant as to the boundary line must make a declaration that he has inherited his lands from his ancestors and if there is not sufficient evidence in the landmarks which the trees and other natural objects furnish then it must be decided by judicial combat between the disputants.[3] M.

[1] Recherches, p. 326. Origin of Property in Land, p. 11.

[2] "Die Genosse selbst hiessen *consortes*, Mitmärken oder commarchani." — Maurer, Einleitung, p. 140.

[3] "Quoties de terminis fuerit orta contentio, signa quae antiquitus constituta sunt opertet inquirere, id est aggerem terrae quem propter fines fundorum antiquitus apparuerit fuisse congestum, lapides etiam quos propter indicium terminorum notis evidentibus sculptis constiterit esse defixos . . . in arboribus notas quas decorvos vocant, si illas antiquitus probant esse incisas." — Baiuwariorum, XII, 4.

"Quoties de *commarcanis* contentio oritur, ubi evidentia signa non apparent in arboribus, aut in montibus nec in flumin-

Fustel again calls attention to the fact that the case cited by Maurer in the Ripuarian Law not only does not prove communism but does prove private property in land. "If any one (§ 60) buys a small estate, etc. — If a proprietor encroaches on a neighboring proprietor, etc. — The boundary (terminatio) of the two estates is formed by distinct land-marks, etc. — If a man overstep this boundary (marca) he shall pay a fine."[1] In none of these laws, is there found any trace of community of property or of an organized self-governing group of freemen. In all there is evidence of private property. It is evident that men own cultivated fields, vineyards, pastures, woods.[2] They may sell, give away or bequeath[3] any or all of these. Punishment is ordained for those who remove landmarks. "The whole body of German law is in fact, a law in which private property reigns supreme."[4]

ibus." — Id. XII, 8. "Si probatis nusquam inveniri dinoscitur . . . cui Deus dederit victoriam, ad eum designata pars pertineat." — Id. XII, 8. Quoted by Coulanges. Cf. also Leges Alamannorum Tit. LXXXIV; Walter ed. (1824). .

[1] Quoted in Origin of Property in Land, p. 12.

[2] "Si quis in *sylva alterius* materiamen furatus fuerit, etc." — Lex Salica Tit. VIII. IV. Walter, ed. Corp. Jur. Germ. Antiq.

[3] On the subject of inheritance, see Lex Salica, Tit. LXII, 1, 2, 3, 4, 5, 6. Walter ed. Vol. I.

[4] Origin of Property in Land, p. 17.

A very large number of the references which Maurer employs to prove the existence of *communal* society are to the collections of charters from the 8th to the 14th century. They are in fact deeds of private property. Maurer and his followers infer the existence of the free village community not only from the use of the words *marca, commarcani, consortes*, etc., but also from the occurrence of the words *communia* and *allmende* in these documents. There seems to be some foundation for the complaint of M. Fustel that not only are words and phrases seized upon to the exclusion of abundant evidence in the entire documents to the contrary of the contention, but that these words are not assigned their plain meaning at that period and in the given connection. For example *communia*. In the deed[1] of Amalfrid and his wife Chilberta (anno 687), in which they make a gift to the monastery of St. Sithin, the instrument goes on to say that the domain is given "in all its integrity, comprising lands, mansi, buildings, slaves, fields, forests, meadows, pastures, waters and watercourses, mills, *communia*, etc., without any reserve." Whatever *communia* is, it is owned and deeded. It is hardly

[1] Diplomata, ed. Pard., No. 408. Cited in Recherches, p. 341.

the Teutonic mark with its organized group of Teutonic freemen that is thus owned and deeded. So *allmende*, which occurs in no document before the 12th century, is but another word for *communia*. In a deed of 1150, cited by Maurer, the owners give to a monastery an estate and their rights to a "common forest which the inhabitants call *allmende*," and in which they have the right of gathering wood and feeding hogs. But the deed further explains that this forest had belonged to the ancestors of the grantors, and that these had given to their tenants certain rights of usage which the present grantors wish to confirm to them in perpetuity.[1] Professor Kovalevsky, formerly professor of Jurisprudence in the University of Moscow, an enthusiastic discoverer of traces of the primitive village community, complains[2] that M. Fustel refused to recognize in these documents the communism which is implied in the equal enjoyment

[1] An illustration of the use of silva communi may be found in the Lex Ripuaria, Tit. LXXVI, "If any one shall have taken from the *common forest of the King or of any body else, etc.*" Evidently a forest in which the king or other person granted communal privileges of some kind.

[2] "Quelq'uns, comme M. Fustel de Coulanges par exemple, refusent de reconnaître à ces faits un caractère de communisme." — Kovalevsky: Tableau des origines et de l'évolution de la famille et de la propriété (1890), p. 174.

of certain rights of pasturage and of the use of forests. M. Fustel surely does recognize the communal character of these usages, but it is a communism of dependents and tenants, not of self-governed proprietors of an undivided and undividable mark. Kovalevsky implies that these common tenant-rights[1] are not *necessarily* derived from a previous regime of individual ownership. This is of course true, but the point to observe is that they have been taken as *the absolute proof* of the *non-existence of individual ownership*, which they certainly are not. M. Fustel's contention is that wherever in the earlier documents words implying community of rights in land occurs, the evidence of the documents themselves is that this community is (1) either the joint and undivided ownership of a forest by two neighboring proprietors, or (2) a joint ownership of several proprietors of the same estate,[2] or (3) the common enjoyment by a body of tenants of a portion of an estate either gratuitously or for a rental.[3] There

[1] "Certains faits ne dérivant pas nécessairement d'une propriété individuelle antérieure." — Ibid. p. 174.

[2] Among the numerous illustrations of this, an excellent one is cited by Mr. Ross from the Lauresham Codex: "De illa silva communis quantum jure hereditario ad me pertinere videtur." — Early Hist. of Land-holding among the Germans, p. 38.

[3] Recherches, p. 354.

are abundant examples of the cession of entire estates with their servile populations upon them. "Dono rem meam in pago illo, id est mansos tantos cum edificiis supra positis una cum terris, silvis, campis, pratis, pascuis, *communiis, necnon et quidquid ibidem commanentibus vel aspicientibus*, omnia et ex omnibus, quidquid in ipso loco mea videtur esse possessio vel dominatio." From the 12th century forward communities are occasionally to be met with, such as that of the 12th century cited by Kovalevsky, where the inhabitants of a villa owned and enjoyed a forest in which, it is declared, nobody has any private property but all own it in common.[1] But it is well to observe, not only the lateness of the date, but that these *may* equally well be explained as originating in dependent communities cultivators which were confessedly wide-spread long before that period. Furthermore, the very language of the document implies a regime of private property. It is worth while to remember that the whole body of documents, from the earliest period from which evidence has been gathered in support of this peculiar communal institution, contain

[1] Tableau des origines et de l'évolution de la familie, p. 178. This and similar cases cited also by Fustel in Recherches, p. 350.

abundant and undeniable proof of the individual ownership of land, — a fact which certainly weakens the dogma that "the original basis upon which *all* Teutonic society rests"[1] is communal.

It is with evident relish that M. Fustel calls attention to the fact that Maurer and his disciples have referred so abundantly to the *Traditiones*, or collections of deeds of private property, to establish the universal existence of communal property. "Ten thousand documents of gifts, wills, sales or exchanges," he exclaims, "which form an absolute proof of a system of private property, out of which eighteen or twenty are taken and misinterpreted to prove that it did not exist." "Maurer has not furnished us with a single proof, a single quotation, in support of the community or association of the mark that he pictures to himself as existing when history first begins. Go over the innumerable quotations at the bottom of his book; more than two-thirds relate to private property; of the rest, some hundreds are concerned with minor points unconnected with the subject; not a single one touches the main question; or if there are any which at first sight

[1] Kemble, Saxons, I, p. 53.

appear to do so, the slightest examination shows that they have been misunderstood or misinterpreted."[1]

Very similar were the conclusions arrived at, quite independently, by Mr. Denman Ross, whose work, based upon a thorough examination of the documentary evidence, deserved more attention than it has obtained. The scant consideration which his writings received may have been due, in part, to a certain temerity which he displayed in refusing allegiance to a theory which had received such unquestioning acceptance by historians whose names the world delights to honor. With such support to the theory, it was easier to pass by an innovator than to refute the force of his reasoning. Perhaps the confident tone in which he asserted his conclusions that "the mark is the manor, first and last; that the lord of the mark was the lord of the manor,"[2] and the bold attempt, not only to destroy the idol of the "Golden Age" of Teutonic history, but to reconstruct the complex history of that period, are partly responsible for a certain lack of attention to the evidence which Mr. Ross has brought to bear upon the subject.

[1] Origin of Property in Land, p. 61.
[2] The Mark and the Manor (1879).

The result, then, so far as the continental evidence is concerned, is to establish the existence of private property as far back as there is any documentary evidence, roughly from the 5th century onward; to show the presence of large estates with a dependent population of cultivators upon them; to show that the estates with their dependent population were bought and sold, given away and bequeathed; to show that communal privileges in forest and pasture were granted to tenants by the proprietors; and to show that these communal privileges sometimes hardened into rights. It would remain for the advocates of the mark theory to show that alongside of these there existed, in the earlier period, groups exercising communal ownership and self-government; that these had an independent origin; that the manorial estates grew out of such groups; and that the mark had become the manor before there was any documentary evidence bearing upon the case, or else that the documents prove their contemporary existence.

The earlier evidence, so far as England is concerned, is much of the same character as that of the continent. Attention has been called to the fact that the laws of Ethelbert (597–616) show the exist-

ence of private property at that date.[1] Whatever may have been the character of the estates, the *hams* or *tuns*, there can be no question as to their individual ownership. "If a man drink at a man's *ham*, etc. If in the king's *tun* a man slay another, etc. If in an earl's *tun* a man slay another, etc. If a man into a man's *tun* enter, etc."[2] While it has been noticed, the important bearing of this fact of the individual ownership of land, which is attested by the earliest Saxon documents, does not seem to have been sufficiently dwelt upon. From the very first charter given in the collections of Kemble[3] and Earle,[4] that of Ethelbert, A.D. 604, "*Idoque tibi sancte Andrea, tuaeque ecclesiae . . . trado aliquantulum telluris mei. Hic est terminus mei doni, &c.,*" onward, we have abundant documentary evidence of the ownership of estates, and of their transfer with all their belongings.[5] It has been pointed out

[1] Seebohm's English Village Community, p. 174.

[2] Laws of Ethelbert. See Thorpe's Laws of Ancient England.

[3] Kemble, Codex Diplomaticus, I, 1.

[4] Earle, Land Charters, p. 3.

[5] A good example is in the deed of Wulfhere, 674: ". . . dabo Berhferthe propinqus meus aliquam partem agri in hereditatem perpetuam, id est. v. manentes . . . cum campis et siluis et omnibus utensilibus rebus ab isto agro pertinente; aeternalite ac perseuerabiliter possideat abendi vel dandi cuicumque eligere

that not only was the soil transferred, but the cultivators upon it, and that these were described by the same terms as, in contemporary use upon the continent, were applied to serfs bound to the soil.[1] We are told by Bede that King Oswy (circ. 655) in his war against Panda, vowed that in case he should be successful he would give twelve manorial estates[2] for the founding of a monastery. A little later we are told that he fulfilled his vow and that the estates had ten families each, one hundred and twenty in all.[3] The Abbess Hilda, having acquired a possession of ten families[4] at the place called Streanaeshalch, founded there a monastery. King Ethelwalch gave to the prelate Wilfrid the land of

voluerit. Hoc agrum liberatum est cum xxx. mancusis cocti auri, et semper liber permaneat omnibus habentibus, etc."— Earle, Land Charters, p. 5; or in the deed of Aethelbehrt given in Kemble's Codex Diplomaticus, I, 4, "opituli ei *villam* nomine Sturigno, alio dictam Cistelet, cum *mancipiis*, siluis, cultis vel incultis, pratis, pasquis, paludibus, fluminibus, et contiguis ei maritimis terminis, eam ex una parte cingentibus, omnia mobilia vel immobilia, etc., etc."

[1] Cf. Ashley's Introduction to Origin of Property, xv. Also discussion of *tributarii* by L. Hutchinson in Qr. Jr. Economics, VII, 205.

[2] "Duodecim possessiones praediorum ad construenda monasteria donaret." — Bede, Eccles. Hist., III, xxiv.

[3] "Singulae vero possessiones decem erant familiarum, id est, simul omnes centum viginti." — Ibid.

[4] "Comparata possessione decem familiarum." — Ibid.

eighty-seven families[1] to maintain his company of followers who were in banishment in a place which was called Selsey. One might imagine that "the land of eighty-seven families" was merely the measure of the land, the land capable of supporting that many families, were we not distinctly told that the king gave all the property there "with the lands (estates) and with the men,"[2] and that among these there were two hundred and fifty slaves, male and female, whom the good prelate freed from bodily servitude.

Caedwalla, though a heathen, had bound himself by a vow to give one-fourth of the lands of the Isle of Wight to religious purposes. The measure of the island is of 1200 families, and so the bishop had given to him the land of 300 families.[3] The Anglo-Saxon version describes the extent of land as so many hides. The Anglo-Saxon Chronicle records that the king gave Columba (about 565) the island of Ii, wherein are five hides; and, again, that Kenwalk gives Cuthred 3000 hides of land. Though it might

[1] This mode of reckoning land by the *number of families* is in itself significant.

[2] "Illi rex cum praefata loci possessione, omnes, qui ibidem erant, facultates cum agris et hominibus donavit."—Bede, iv, ch. 13, § 291.

[3] Ibid. iv, 16.

be maintained that these do not necessarily mean the holdings of manorial estates, together with the services of the holders, and that they merely indicate a measure of land, yet they indicate the great prevalence of private landed property, and that in the form of large estates.

Kemble himself admits[1] that lands were conveyed by charter from the time of the introduction of Christianity (597), and is not disposed to deny that they were conveyed before that time by symbols in the presence of witnesses. It would be incredible that the owning and disposing of estates with their cultivators, should suddenly spring into existence with the coming of Augustine, though he may have introduced the written charter. It is significant that with the first documentary proof, private ownership in land seems to be a fixed institution. This, taken in connection with the earliest continental evidence bearing upon the case, renders it highly probable that the Saxons brought a knowledge of private landed property and serfdom from the continent.

Beneath the class of dependent cultivators, who were bound to the soil, and whom we ordinarily speak of as serfs, it is evident that there was a slave class who were mere chattels, bought and sold at the

[1] Codex Diplomaticus, Introduction.

will of the master. There are abundant proofs of this. Bede furnishes an example, in addition to the one already cited, in the passage where Bishop Aidan is commended for using the riches bestowed on him in ransoming such as had been *wrongfully* sold as slaves.[1]

It was under the stress of such evidences of property and social inequality that Professor Allen, who accepted the free village community theory, but who could not find it in Caesar or Tacitus, was constrained to admit that it had been proved that it did not exist in the 5th century.[2] "The free village community, therefore," says he, "is a natural and probable connecting link between what we know to have existed in the 1st and what we know to have existed in the 5th centuries."[3] It is well to notice that this pushes the free village community back into the narrow confines of the three or four centuries succeeding the first, into a period where there is scarcely a ray of historical

[1] "Redemptionem eorum qui injuste fuerat venditi." — Bede, iii, 5.

The examples are abundant. "If a man buy a maiden with cattle, let the bargain stand, if it be without guile."— Laws of Ethelbert, 77. See Thorpe's Ancient Laws, p. 9.

[2] Monographs, p. 236.

[3] Ibid. p. 238.

light. Of that period a word or two may be said hereafter. It must be granted, however, that while the earliest documents reveal the existence of the ownership of land and of serfdom, they do not show the non-existence of some such free communities; but they do make it incumbent upon those who assert the existence of such bodies to make good their assertions with proofs. There is other evidence which must not be neglected. The inequalities of wealth and rank, the influence of noble blood and military prowess, and the substructure of serfdom, which are revealed to us by Tacitus, have been adverted to. When next the light of history falls upon Teutonic society we again see it permeated with the essentials of an aristocratic state.[1] We see again the king, the noble, the serf, the slave. We see wealth and power accumulated in the hands of a single individual. The inference is not unfair that a similar state of society prevailed during the intervening period, even if it were possible for an

[1] Bede is full of evidence as to the nobility, and the concentration of wealth and power, e. g., Book III., 24, 27, 30. It is remarkable that there is not similarly clear evidence in regard to the alleged self-governed village communities. Even the evidence in regard to the inequalities which is afforded by the laws in regard to *wergild* is proof of an aristocratic and not of a democratic structure of society.

agrarian system to spring up, flourish and decay in so brief a time. Indeed, it is hardly possible, even if it were proved that there were instances of a free communal mark at the beginning of English history, to believe that it was the characteristic form of the governmental or agrarian system. Much more in accordance with the facts appears to be the view of Palgrave, a writer on constitutional history who though he wrote before the doctrine of Kemble and Maurer had made its appearance, is not so antiquated as not to be studied with profit. He says that from the dawn of Anglo-Saxon history "Aristocracy was the prevailing principle of the Anglo-Saxon government; and, though mere nobility, that is to say, nobility unaccompanied by landed property, did not confer authority, still the main privileges of the Patrician were the results of blood and parentage."[1] Again the same author tells us[2] that "according to the policy which appears to have prevailed amongst all the Teutonic nations, the Anglo-Saxons were divided into Castes whose rank was the measure of their estimation before the law, and from whose various privileges the entire system of the laws and constitution was deduced," an asser-

[1] Palgrave, Eng. Commonwealth, I, 2.
[2] Ibid. I, 9.

tion which Anglo-Saxon law abundantly verifies.[1] And it is worth while to remark in this connection upon the curious fact that those earlier explorers in the regions of English constitutional history, Thorpe, Palgrave, and Hallam,[2] altogether failed to discover an institution at once so unique and so much in sympathy with the tendency of modern thought.[3]

[1] Earle's Land Charters (1888), introduction, xlvi: "The lord of the manor is an essential member of the original settlement." Pollock, The Land Laws, p. 11: "Even the personal freedom of the old days was the right of a privileged class."

[2] For Hallam's influence on historical teaching see Ashley, Economic Review (April, 1893).

[3] Kemble accounts for this failure on the ground that his predecessors had made of themselves "degenerate Greeks and enervated Romans," and had rendered themselves unable to understand the peculiarities of Saxon institutions. — Cod. Dip. Intro. iii.

IV.

DISCUSSION OF THE LATER EVIDENCE.

LEAVING then for the present the earlier evidence, for after all it was never upon contemporary evidence that the theory was made chiefly to rest, — let us turn to the later evidence and to the second line along which modern discussion has proceeded. The stronghold both for the establishment and the support of the mark theory has been the soil itself and the facts in connection with it which are patent to the eye of every observer.[1] These facts and the documents of the past five or six hundred years are taken as the basis upon which an inference is to be made in regard to the state of facts some thousand years earlier. The method is, "Here are some matters of common observation and some facts of recent history. Whether the result of

[1] And how slender a support this is may be inferred from the language of Freeman: "It is as much as we can do to trace out some faint footsteps of the ancient system, such as we can see in common lands, in some form of communal institutions, in petty and half obsolete local tribunals." — Norman Conquest, I, p. 86.

growth or decay, we find their origin in the past. What was that origin?" The question is perfectly fair, and the method is perfectly legitimate, especially if the phenomena are observable over a long period; for then it is possible to notice the trend of events. Where the change is so slow, as it is in agrarian systems, the conditions are especially favorable. And yet the dangers are obvious, and have again and again been pointed out. Here is a certain effect; what was its cause a thousand years earlier? Like every resultant it has a large number of possible components. It is particularly desirable that in looking upon the phenomena as *remains*, there should not have been formed in the mind a picture of the thing of which these are the remains. But that is just the state of mind that a theory, when once accredited, is likely to bring about. It is also desirable that the results be constantly compared with the known facts of the period which it is proposed to reconstruct. The contrivers of the mark theory said, "Here is a curious system of intermixed ownership of land. Here are certain tracts of land of which many people have a common enjoyment. Here are certain rights and duties of tenants in connection with the manorial courts. These things might have had their origin in a free and self-gov-

erned communal group. They did have such an origin."

It was at the time when this conclusion was at the high tide of its popularity that Mr. Seebohm gave to the world the results of his studies.[1] Even in this our day, when the seeker after scientific accuracy is supposed to be coldly indifferent to current opinion, or any other opinion, it required considerable courage on the part of one, even of Mr. Seebohm's reputation, to present studies which seemed at variance with the popular current.

Beginning with the remains of the open-field system as visible in the soil of England to-day, and as discovered in a map and court records of an English township of the present century, he gathers up enough threads to enable his reader to understand the land divisions, the terminology, and the mode of cultivation of the manorial system. There had never been so clear and complete a statement of the system, and to American readers, especially, Mr. Seebohm's description was very helpful.

[1] Seebohm, The English Village Community, London, 1883.

Around the English village,[1] which was commonly under a manorial lordship, lay two or three, "common," "commonable" or "open fields." These fields constituted the arable lands of the village and were made up of divisions, sometimes called "shots", or "furlongs," which in turn were made up of acre strips, separated from each other by turf balks. Originally the holding of any one individual was made up of scattered acre or half acre strips throughout the two or three fields of the manor. It was the object of the Enclosure Acts[2] to change this awkward system. The four thousand Enclosure Acts, between 1760 and 1844, show that this was practically the universal form of agricultural operations at an earlier period. By a chain of evidence the same system is traced back to the time when the feudal system was at its height, and the open field cultivation and the manorial regime are shown to be intimately connected, if not one and the same thing. Perhaps all would readily admit that, during the feudal period, the manorial system was practically the universal method of cultivation throughout England. It was, as we Americans would say, the method by which England was "farmed." Through the changes in tenancy

[1] Eng. Village Com., pp. 7, 8. [2] Ibid. p. 14.

brought about by the Black Death in 1349–50, we are enabled to get a typical illustration of the system in the Winslow Manor Rolls.[1] The land is seen to consist of lord's *demesne* and land in villeinage. The villain's holding consists of acre and half acre strips scattered throughout the three fields.[2] The bundle of strips so held (normally about thirty acres) is a virgate or yardland. The great body of tenants is made up of these holders of virgates, half virgates, and acres, and are in serfdom. Going back to the Hundred Rolls (Edward I, 1279)[3] we learn of the classes of tenants, the *libere tenentes*, the *villani*, or virgate holders and half virgate holders, and the *cottier* tenants, and the services and payments of each.[4] The chief services rendered to the lord of the manor were, 1st, *week-work*, consisting of two or three days a week on the *demesne* throughout the year; 2d, the *precariae* or *boon-days*, extra work at busy seasons, e.g. ploughing times and harvest; 3d, payments in money and in kind. In addition to this there were yet more servile incidents, such as the payment of a fine for the marriage of a daughter, or the sale of an ox, and the obligation not to leave the lord's land, etc. The

[1] Eng. Village Com., p. 22.
[2] Ibid. p. 28.
[3] Ibid. p. 34.
[4] Ibid. p. 41.

whole body of tenants was under the direction of manorial officers.

The entire chain of evidence wrought out with great patience and detail carries us back to Domesday, and shows us essentially the same thing in operation throughout England — manorial lords, freemen,[1] villains, cottagers, and slaves, all forming parts of the same system. It is this vivid picture of all England under one vast system of villain tenure, with its oppressive servile labors, payments and exactions, which forms Mr. Seebohm's most striking contribution. It is this which renders all dispute about words, as whether the villain was a serf or a freeman, of little value. If a man is compelled to render to another a fixed service of considerably over a hundred days in the year; if in addition to this he must work twenty or thirty days more at the will of the other, in all, perhaps, half the working days; if in addition to this he must make payments of produce or money to that other; if in addition to this he is bound to the soil; if he cannot marry his daughter without this superior's consent, nor sell his ox, nor grind his grain elsewhere than at the mill of this superior; if he have

[1] The terms liberi, libere tenentes and freemen are used interchangeably.

no status, or an uncertain one, in any except the lord's court; if the lands he cultivates go into his superior's hands at his death, and when regranted, must be regranted without division and on the payment of a fine; then it little matters whether he is called a serf or a freeman, so long as you know the state of the facts. And that this can be taken as the typical condition of the villain of post-Domesday times can hardly be doubted.

The Domesday book itself (1086) presents to us the same picture. There is the same division of the land into lord's *demesne* and land in villainage, the same kinds of holdings, the same classes of tenants. According to Ellis's estimate as to population, 70 per cent. were made up of villani, and the still more dependent class of bordarii and cotarii. The former have usually single virgates and half virgates; the latter a few acres, or merely a cottage. They hold in villeinage one-half the cultivated lands of England.[1] One-eighth of the population, holding perhaps one-fifth of the land, apparently under the same tenure as the villain, are classed as libere tenentes and sochmanni. The lords of the manor and the servi or slaves, each formed less than one-

[1] Eng. Village Com., p. 90.

tenth of the population.[1] So, taking the England of Domesday, — and Domesday was said to include every yard of land in it,[2] — we have at that time a population and an agricultural system in which the great mass of the people is in social and economic dependence and subject to exactions of a servile character. But the criticism has been made that too much stress has been placed upon the *terms* used in Domesday. It may be said, with some show of reason, that Domesday is first and foremost an enrollment of lands for purposes of taxation; that it is not a description of classes; that the mention

[1] Ellis gives the following estimate: —

Liberi Homines	10,097
Sochmanni	23,072
Villani	108,407
Bordarii	82,119
Cotarii	5,054
Servi	25,156
Burgenses	7,968
All others (most of whom might fall in the above classes)	21,369
	283,242

See Ellis's Introduction to Domesday Book, Vol. II, p. 511, *et seq.*

[2] "Tam diligenter lustrari terram permisit, ut ne unica esset hyda, aut virgata terrae, ne quidem (quod dictu turpe, verum is factu turpe non existimavit), bos, aut vacca, aut porcus praeter mittebatur, quod non is retulerat in censum." — The Anglo-Saxon Chronicle, as quoted in Ellis's Introd. to Domesday Book, Vol. I, p. 15.

of the latter is purely incidental to the ascertaining of the former, much less is it a description of the services of these classes; that the *barones regis*, who made the survey, knew little and cared less about the status of the tenants, and hence, that any inference as to their freedom or serfdom, must be taken with large allowance. Yet after all, this great historical monument, founded upon the sworn testimony of the cultivators in each neighborhood, must present the rough outline of the agricultural system as it existed, and it is the broad facts and not the isolated cases that we are seeking.

Domesday is practically a description of the conditions under Edward the Confessor and at the close of the Saxon rule.[1] The same manors were crown manors before and after the conquest; the monasteries for the most part continued to hold their manors, and the Norman knights came into possession of those of the Saxon thanes.[2] Whatever

[1] Eng. Village Com., pp. 82, 83.

[2] It would be a mistake to think of a manor only as a *great* estate. Many of them were very small. E.g. the Manor Fallei given in the Domesday for Devonshire. One Drogo holds it of the Bishop. Drogo has half a ferling and one plough (land) in demesne. There Drogo has one villain, two borders, and one serf, three head of cattle, five swine, six sheep, and ten goats, four acres of wood and six acres of meadow.

may have been the system at the beginning of the Saxon rule, at its end, a system in all respects identical with the manorial held universal sway.[1] There was the same open-field system, the same division into lord's land and land in villainage (thane's *inland* and *geneat land*), the same holdings of bundles of intermixed strips, the same classes of tenants, the same kinds of labor dues, payments, and servile exactions under the Saxons before the Conquest, as under the Normans after the Conquest. The evidence of the same system in detail is carried back to the 10th century by the Rectitudines Singularum Personarum.[2] Here we have the conditions precisely like those of the 11th century, as to the cultivation of the estates by tenants in economic and social servitude, and this document is supported by other contemporary evidence.

Thus far, it is generally admitted, Mr. Seebohm has made out his case, though it is not so generally admitted that the conditions described were by any means so universal as he would contend. But this was the *settled* condition of things a century before the Conquest. It was not a sudden invention. No

[1] Eng. Village Com. p. 84.

[2] See Thorpe's Ancient Laws of England, p. 185.

agricultural system can be. How far it ran back, whether the Saxons had been led to revolutionize their system since their occupation of the country, is of course hard to determine. But the scanty earlier evidence at our disposal furnishes hints of the same system, and certainly does not furnish proof of any other. The evidence of the charters as to ownership of land runs back as far as the Saxon documents go, and the evidences of inequalities of wealth, rank and power, have already been cited. The Laws of Ine (A.D. 688) bear testimony to yard-lands (virgates), labor dues, and payments. It further gives a hint, not only of the condition of the slaves, but also of some who were called "freemen."[1] "If a theow work on Sunday by his lord's command he shall be free." "If a theow work on Sunday without his lord's knowledge let him suffer in his hide." "If a freeman work on Sunday without his lord's command let him forfeit his freedom."[2] This is within two centuries of the Saxon invasion. Going back to the laws of Ethelbert in the 6th century, we

[1] Prof. Ashley compares the position of the dependent freemen to that of the Roman *colonus*. Intro. to Origin of Property in Land, p. XL.

[2] Thorpe, Ancient Laws of England, I, p. 105.

Note the similarity of the terms used in speaking of the *theow* and the *freeman*.

undoubtedly find there a hint of the manor, and certainly evidence of private estates.[1] Now when this line of evidence is not left loose but is joined with that from the earliest period downward with which it harmonizes; when it is viewed in the broad light of the known facts in regard to the social structure, it forms a chain which is not easily broken. It has been said that there is a gap here, that the evidence is weak. It is not weak on its positive side. It establishes beyond question the existence of individual landed property from the 4th or 5th century to the present, with a strong probability, to say the least, of its existence in the Germany of Tacitus.[2] It establishes beyond question from Tacitus forward an aristocratic social organization with its gradations of rank, wealth and power, a condition of things which was intensified by the warlike character of the age. It establishes beyond question the existence of a servile popula-

[1] Eng. Village Com. p. 173.

[2] It has been well remarked by Professor Birkbeck, "We find serfdom existing in England soon after the Norman Conquest under the name of villeinage; we find serfs in Saxon times under the designation of geneats and geburs; we find serfdom forming part of the German agricultural system in the days of Tacitus. Is there not a strong probability that the first mentioned custom was derived from the last?"—Distribution of Land in England, ch. III.

tion from the time of Tacitus, until through economic and social progress it finally disappeared. The evidence is weak in not being able to *prove* a negative, that is, that free communal village groups did not also exist. But it is well to note the entire absence of any proof of communal ownership in Tacitus, and a similar absence of anything which may not be explained equally well as the communal enjoyment of privileges under a lord. It is not sufficient to establish the existence of a hitherto unsuspected institution to give such an interpretation to terms, of which we have not as yet adequate knowledge, as shall account for the institution of the theory. We talk about serfdom and freedom as though these very terms were used during the Saxon period in the modern sense, and that even though we are not yet agreed as to what the terms now mean. We say of a 6th century man or a 11th century man that he was free. Free from what? Free to do what? The freedom which was "the privilege of a class" was very different from the 19th century conception of freedom. One understands by serf a slave like the Roman slave, or the slave on one of our *ante bellum* plantations; used in such a sense the serf population of England was small. Another understands by serf a depen-

dent standing in a position between that of an American slave and that of the man who can go where he will, when he will, enter freely into contracts and be free from servile exactions. The dependence of a very large portion of the population is indisputable.

But if the considerations to which the study of the later evidence has given rise were left here, its most important element would be omitted. For we have already called attention to the fact that the method of following back to the unknown from the known is chiefly valuable in enabling us to discover the direction of historical development. The broad facts are what we chiefly want. It would be perfectly legitimate to ask, what upon the whole has been the tendency of the development in the laboring population of England from the *Rectitudines Singularum Personarum* to the Reform Laws. Not the isolated case, but the general condition is what we want. Now, it is perfectly conceivable that there may have been a back-and-forward, pendulum-like movement during brief periods, so far as political conditions are concerned, but such could not be the case in respect to the agrarian system, except for long periods. The question as to the direction of

economic and political development for the past five or six centuries may be dismissed, for all will instantly admit that there has been a very slow but very steady progress toward greater freedom. But how was it from Domesday onward, or, if you please, from the *Rectitudines?* Now, the series of documents from Domesday downward show a very rapid increase in the number of *libere tenentes*[1] and *sochmanni*, and the decrease and disappearance of the *servi*.

Professor W. J. Ashley, who takes substantially the view that the evolution of Teutonic society has been in the main from a condition of serfdom toward greater freedom, has made an important contribution to the whole subject of the *direction* of this evolution from the 11th century forward by the emphasis which he has placed upon the increasing numbers of the higher classes of tenants, the growing importance of 'commutation,' the increasing disposition of manorial lords to let certain privileges, or their entire estates at an annual '*firm*' or rental to some individual, and occasionally to the entire manorial community.[2] In the chapter

[1] An excellent illustration is given in Ashley's Economic History, p. 23.

[2] Examples of the latter in the Worcestershire Register, 47 a and 54 b, have been cited by Nasse in Land Communities and Ashley in Economic History.

on *The Manor and Village Community*, in the first volume of his Economic History, and in the Introduction to *The Origin of Property in Land*, and elsewhere this tendency and its effects have been pointed out.

From labor services at the lord's will there was in the twelfth century rapid progress to labor services of fixed amount, and from this a still more rapid progress to the commutation of these for fixed money rents.[1] Professor Allen indeed was not ready to grant that from the 10th to the 13th century serfdom grew from harsher to less harsh.[2] In fact he thinks that the opposite was the case. He would put a different interpretation upon the requirement of labor services "at the lord's will," than that the obligation was one of unlimited liability to labor. He supposes that the time and manner of these services were fixed largely by custom, that they were merely nominal, and that in fact they were much less severe than the fixed week-work of two or three days a week which prevailed in the 11th and 12th centuries. But it will be remembered that the *Rectitudines* mention labor

[1] "He (the villain) obtained by custom fixity of rent and fixity of tenure." — Birkbeck, Distribution of Land in England, ch. ii.

[2] Monographs, p. 244.

for two or three days every week. The supposition that the requirement of labor-service at the lord's will was merely nominal, and was with "the understanding that no unreasonable demands should be imposed on them" is gratuitous. The example that Mr. Allen cites[1] from the *Rotuli Hundredorum* of tenants complaining that their services had been increased is an instance of boon-days, and not of week-work. No doubt there were such cases, and the one cited merely shows that in the time of Edward I. the tenants had gotten to the point where they would resist an unusual demand for extra services. But it is not so much that the evidence shows a decreasing number of days of service in the course of the year, nor even the more important matter that there was a precisely fixed amount of service upon which they could depend; but it is the rapid rise of tenants to a higher class, as indicated by the decrease of the lower and the increase of the higher classes, and the rapid commutation of services for money dues, that proves the growing emancipation from economical servitude.[2] The longer the period con-

[1] Monographs, p. 245.

[2] Vinogradoff thinks that the influence of the Norman Conquest, in bringing about *certainty* of condition as to tenure and status of the villains in ancient demesne, was of the highest importance in maintaining their privileges and promoting their liberties. — Villainage in England, pp. 124, 126.

sidered, the more apparent is this trend. It has been pointed out that during the 12th and 13th centuries may be observed the process by which the communal organizations, not under a manorial lordship, of which there seem to be some examples, came into existence.[1] The growing tendency to commute services for money payments was accompanied by another by which the entire income of the manor, its services, fines, court dues, meadows, manorial mills, etc., etc., were let to an individual at an annual "firm" or rental, and the "firmar" was sometimes the entire manorial village, the villata. The communal organization, which was essential to the manorial system, made such action of the village as a unity possible. Mere communal action is as good proof of a servile as of a free community. If there are some cases in which a serf community, through operations which were well known, came to control its own affairs, does it not create a presumption that others where the process is not so obvious may have become so by the same means? The tendency of temporary agreements and privileges, which were no doubt at

[1] Ashley, Economic History, pp. 37, 64. There are indeed cases in Domesday where the tenants hold the manor apparently as a body. But it is always under a lord. "Ipse episcopus tenet Melbroc. . . . Villi tenuerunt et tenent. Non est ibi aula." — I. 41 b. See also Alvarestoch.

first advantageous to both lord and tenants, to harden into custom, and of custom to harden into right and law, strongly contributed to this growth toward greater economic and social freedom.

It has been urged that the loss of ownership and its exchange for mere rights of use of woods and pasture which tenants enjoyed in the Middle Ages, were due solely to the encroachments of the lords. But these privileges must have existed and hardened into rights on estates where there were dependent cultivators, and that there were such estates is indisputable. The suggestion of what was virtually a great conspiracy over a considerable period of time, viz., "that the lords, and lawyers acting in the interests of the lords, *got the people to believe* that the lord's will was the origin of those ancient customary rights which were before absolute,"[1] can hardly be saved from being characterized as an utterly artificial interpretation of historical development even by the eminence of the names that have given it countenance. That a body of lawyers, at any period in the world's history, deliberately set to work to enslave a great people, and succeeded in "getting them to believe" that they had always been in that slavery, is hard to believe.

[1] Pollock, The Land Laws, p. 48.

The *equality* in the size of the strips of land, and in the bundles of strips forming a single holding, and in the condition of the tenants, has been regarded as of fundamental importance in the mark theory, since it was held to be proof of the *equality of the freemen* of which the village community was composed. Mr. Seebohm maintains that this equality is an evidence of serfdom, not of freedom. Whether he is right in this or not, it is worth while to notice that in the periods where our evidence is abundant, the tenants amongst whom the equality of holdings and condition is greatest are those who are subject to the most servile exactions. A typical illustration of this may be seen in the case of the tenants of Castle Combe.[1] The history of this manor is full of instruction in more ways than one. In the manorial records for 1340, there are ten tenants classed under the head of "liberi," no two of whom hold on the same terms. They range from William le Knevylle, who holds two and a half virgates and one tenement, and pays one pound of cumin a year, and is subject to heriot, to Henry le Moylner, who holds a water mill and three acres, and is subject to money rent, labor dues which may

[1] G. Poullet Scrope, History of the Manor and Ancient Barony of Castle Combe.

be commuted for money, and payments in kind. It is worth remarking that while in 1340 there are ten classed as liberi, there were none in Domesday. Among the thirty customary tenants there is greater equality, heavier services and exactions. Of the twelve who are classed as *virgatae*, the holdings, services, payments, and servile obligations are precisely the same. So, also, are the holdings, services and exactions of the eleven *dimidiae virgatae*. There are eight *Monday-men* and twelve *cotarii* who occupy tenements, and in some cases hold a few acres of land. It is well to notice that of the thirteen *servi* recorded in Domesday all have disappeared as such. Under the name of "*nativi*" they appear among the other classes. There is good reason for believing that it is a mistake to suppose that all these "servi" or "nativi" became Monday-men or cotarii, and that there was a sort of sliding scale from class to class. Undoubtedly in many cases the "nativi" became holders of virgates and half virgates, perhaps rising above the cotarii. A good illustration, both of this and of the gradual rise from a servile condition to a higher class, may be seen in the court rolls of Castle Combe, under date of 1367,[1] in which case John

[1] History of Castle Combe, p. 162.

Pleystede, "a native of the lord, was admitted to hold two yards of land 'in bondage,' thus becoming a customary tenant. Let us observe the *direction* of the development in this manor. In Domesday, no freemen, twelve customary tenants, five cotarii and thirteen slaves. In 1340, ten liberi, thirty customary tenants, twenty Monday-men and cotarii, and no slaves. The labor dues are estimated at a money value and may no doubt be commuted. The greater the equality among the members of a class, the more servile the exactions. The examples, however, of both of these facts are numerous.[1] And the farther back we go the larger the proportion of the population that are subject to equality of holding, services and exactions.

Professor Allen, though he finally admitted that a servile community is an original part of Saxon history on English soil,[2] nevertheless believing "that the political institutions of the Germans were essentially democratic,"[3] insisted upon the importance of the free element in Saxon life and in the feudal manor. Professor Earle,[4] likewise, is disposed to

[1] Cf. Mr. Seebohm's examples from the Cartularies of Gloucester and Westminster. — Eng. Village Com. p. 58.

[2] Primitive Communities, see Science, Vol. III, p. 786.

[3] Monographs, p. 216.

[4] Earle, Land Charter and other Saxonic Documents (1888), Introduction.

magnify the free element in earlier Anglo-Saxon society. He rejects, however, the "idyllic sketch of the government of the coerls,"[1] which, as Elton puts it, was "too eagerly adopted by Kemble."[2] "At the first moment of historical light," says Earle, "we find manorial rights everywhere."[3] He would represent to himself, then, at the beginning of English history, the manor with its servile population, and along side of it a free village with a somewhat communistic agrarian system. "The conquerors found a system of agriculture worked by families of slaves in Roman villas; they kept what they found, only putting an English lord into the place of a Romano-British dominicus, and so without further change they founded the 'domain' or 'vill' of the English manor."[4] He suggests further that a village community existed along side of the manor, and that the lord of the manor exercised a sort of presidential authority over this agricultural group;[5] and he thinks that the court baron and the customary court are evidence of this. If the recent suggestions of Mr. Maitland and Professor

[1] Land Charters, Introd., p. xv.
[2] English Historical Review, 1886, p. 437.
[3] Land Charters, Introd., p. xlvi.
[4] Ibid., Introd., p. lx.
[5] Ibid., Introd., p. lxii.

Vinogradoff, in regard to the court baron, to which we will presently refer, are to be accepted, it would weaken the force of Professor Earle's supposition.

In so complex a study as that of the growth of a constitution some elements are apt to be overlooked. It is fortunate on this account that Earle has insisted on the importance of the military influence in the Saxon constitution, to which others[1] have given an important, though hardly so prominent a place. "Their (the Saxons') banded forces were divided by hundreds, and by hundreds they spread over the face of the land, and . . . shaped the first draft of the political map, such as in its most elementary ground-work it continues to this day. At this moment the hundreds on our map represent the first permanent encampments of the invading host. . . . The military leader is the ancestor of the lord of the manor."[2] The military character of the settlement and the military character of their life in succeeding generations should no doubt be kept in mind. As one studies the agrarian system, as presented by Mr. Seebohm, he is apt, unconsciously, to picture an era of unruffled peace, such as the England of the

[1] E. g. Green, The Making of England, p. 169, says, "The land occupied by the hundred warriors who formed the unit of military organization became, perhaps, the local hundred."

[2] Land Charters, lv.

middle ages did not present. Much as his work has done to correct the imperfect notions of mediæval English life, which one is apt to get from poets and romancers, yet it is not to be forgotten that perpetual warfare must have exercised a powerful influence on the character of the social life and the institutions of the Saxons. It is worth remembering that the tendency of military organization is strongly toward a system of authority and subjection. Self-preservation in a rude society requires military power and this demands the elevation of some and the submission of others. And it has been very well observed that, in early Teutonic society, it was not an election by the whole body of citizens which elevated a man to the position of chief, but the getting about him of a body of personal followers who devoted themselves voluntarily to the service of the chief.[1] The organization growing out of this military element leaves little room for a democratic social structure.

The distinction between the manorial system and the feudal system, which Earle makes, is worthy of careful attention. "The manor is far older than the feudal system, and has outlived it."[2] The

[1] Ross, Primitive Democracy in the Alps, p. 4.

[2] Earle, Land Charters, lviii.

distinction would seem to be just. The manorial is essentially an agricultural system, while the feudal is essentially a military and governmental system, based upon land holding.[1] The system of the cultivation of the soil by a group of dependent cultivators,[2] which Tacitus has described is so like that which we find as the basis of English agriculture long after, that it would seem fair to infer that it had had an uninterrupted existence and development.[3] And yet, while it is well to keep in mind these two aspects of the social structure during the middle age, it must not be forgotten that for a time, at least, they form an undivided whole.

As the importance of the military influence in the formation of the Saxon constitution is not to be overlooked, so the legal evidence is a source from which much knowledge is to be expected. The difficulties of the interpretation of this kind of evidence are very great, not the least of which arises from the

[1] Cf. Freeman, Norman Conquest, i, p. 92.

[2] Germania, § 25.

[3] Prof. Birkbeck remarks in this connection: "I am not aware of any reason for supposing that the condition of the peasant class, the actual tillers of the soil, was affected in any sensible degree by the introduction of feudalism." — Distribution of Land in England, ch. ix.

"legal fictions," the character of which has been so admirably explained by Sir Henry Maine.[1] The logical artificiality, the uniformity of conditions presupposed, the sharp lines of legal definition, render it difficult at any time to understand the complex society over which this legal system is in operation. When the legal writers of any period are no more in accord in their interpretation of law, than, say Glanville and Bracton, a still further complication arises. All these difficulties are greatly increased when the attempt is made to interpret conditions of the remote past, which appear to be revealed by present administration of law.[2] It is well nigh impossible, in attempting to follow a "clew," not to have in mind the *thing* to which the clew is expected to guide. The dangers, as well as the advantages of the legal method, are illustrated in the recent volume of Professor Vinogradoff, of the University of

[1] Ancient Law, ch. ii, p. 20.

[2] Gomme makes the point, in Village Communities, page 260, "that the identification of manor courts with the old township assemblies, and hence with the assembly of the primitive village community, cannot be reasonably denied". But are we sure that we really *know* very much about the old township assembly — to say nothing of the primitive village community? There is a deal of talk about the 'folk-moot' and 'halimote,' etc., which is based on rather shadowy knowledge of these institutions.

Moscow.[1] The two essays which form the volume, *The Peasantry of the Feudal Age* and *The Manor and the Village Community*, are the results of Professor Vinogradoff's long and careful study of documents of the 12th, 13th and 14th centuries, and they form a distinct contribution to our knowledge of that period. As has already been intimated, it is the legal evidence that interests him most, and which he has examined with the greatest care. A remark in the introduction gives the key to his position. "It is a great, though usual mistake, to begin with political events, to proceed from thence to the study of institutions, and only quite at the end to take up law. The true sequence is the inverse one."[2] Accordingly, whether dealing directly with the evidence, or stating conclusions in regard to the condition of the population, it is the legal aspect which he presented. The villain may, according to this mode of interpretation, have had a legal status before the court, by reason of which we might call him a freeman, while he yet remained in economic servitude.[3] Those alone are in serfdom who are in

[1] Villainage in England, by Paul Vinogradoff. Oxford: 1892.

[2] Ibid. p. 12.

[3] One writer has tried to express the value of this distinction by the remark that "the Saxon ceorl was not debarred from rising out of his position to any office in the state." A

servile slavery. Keeping in mind the sense in which this author uses the terms "freedom" and "serfdom," there is much in the results, so far as the period from which the evidence is drawn is concerned, to confirm the position of those who have found, in the centuries succeeding the Conquest, a steady approach, on the whole, toward greater freedom. "In many cases we are able to see how freedom and legal security emerge from subjection."[1] The importance of the changes brought about by commutation, and the tendency of those changes toward greater freedom is admitted.[2] It is very evident, also, that the fixity of the customary rents which were thus brought about, resulted finally, through the rise in prices and the decrease in the value of money, in practically transferring the ownership of the villain's holding from the lord to the vil-

Fourth of July orator would probably have clothed the same thought in the phrase, "The presidential chair is within his grasp."

[1] Villainage in England, p. 178.

[2] "One of the great movements of the 13th and 14th centuries was toward the commutation of money services for rent." Ibid. p. 178. "Commutations gave rise to actual agreements, which came, more or less, under the notice of the law," thus giving the villain a legal standing. p. 182. "Commutation was a powerful agency in the process of emancipation." Ibid. p. 188. "The wave begins to rise high in favor of liberty even in the 13th century." Ibid. p. 131.

tain. The effect of the escape from labor services, in establishing a legal freedom, along with an economical freedom, was much more pronounced in the earlier period than in the later. This was due, in part, to the scarcity of laborers after the Black Death, which caused the manorial lords to insist more strongly upon the rendering of customary services and servile exactions after that event. There is a rapid increase in the number of free tenants. The close of the 13th century witnesses stronger assertion of rights on the part of the tenants as a body, greater solidarity in matters which concern themselves, and a disposition on the part of the lord of the manor to lay responsibility upon the tenantry as a whole.[1] The growing freedom of the 14th and 15th centuries is more apparent when contrasted with the legal disabilities of the 11th and 12th centuries. The latter present a dark picture of the status of the great body of villains. Vinogradoff thinks that under the influence of Roman law and the Roman legal conceptions of slavery, together with the attempt at sharp legal definition and classification, a large class of the tenantry are made to appear in a worse light than they were before the Conquest; that is, they have lost their 'technical'

[1] Villainage in England, p. 357.

freedom. There is a considerable probability in this, though there does not seem to be sufficient evidence to show that such was the case. But the question is, "had they in reality lost any practical freedom; were they really in a worse condition than they were before the Conquest?" It is possible that when a description of their position should be cast into legal phrase, under the influence of Roman law, their condition would seem more servile than it had seemed before. But the tenacity with which they held to the customs and laws of pre-conquest times would help them to preserve their ancient rights. At any rate, the arguments by which it is attempted to show that there was a real loss of freedom are far from conclusive. It is one thing to assert that "the Conquest had cast free and unfree peasantry together into one mould of villainage,"[1] and another and more difficult thing to prove that it did actually make any change in the rights and obligation of any tenant. It is certainly an important fact that tenants "in ancient demesne" were protected by the conqueror in the peculiar rights and privileges which they had enjoyed on the royal domain before the Conquest, but it is a far different thing to prove that *all* Saxon tenants enjoyed the same rights and

[1] Villainage in England, p. 132.

privileges as those in the royal manors.[1] It is very natural to suppose that there were special privileges on the royal manors in Saxon as well as in Norman times. The fact that the proprietor was both lord and king might give the tenants a status in the royal courts which others did not enjoy. Mr. Maitland gives an example of the mingling of the functions of two courts in one and the same court.[2] The mingling of functions in such a case is not unnatural. We are told that on the manors of the king the old customs received careful protection; that on the manors of the more powerful barons it was "less possible to work out the subjection"[3] of the peasantry. Is it not strange, then, that on the manors of the less powerful it was not only possible to deprive the tenantry of their ancient rights and privileges, but to "get them to believe" that such had always been their legal condition? One would think that if "conquest *must* work toward subjection" the result would have been the reverse. And stranger still is this, in the face of the explanations that are given of the manorial courts, in which we are told

[1] Vinogradoff, 123 et seq.

[2] Pleas of the Crown for the County of Gloucester, Introd. p. 24. In this case, however, neither of the courts were manorial.

[3] Ibid. p. 132.

that "the weight of the decision is with the body of suitors," [1] and in that the body of the court "have all the best of it"; and that "the presiding officer and the lord whom he represents have not much to do in the deliberations," except the drawing up and announcing the decision, "which is materially dependent on the ruling of the court," viz., the body of suitors. It is distinctly asserted that "the will of the lord became more distinct and overbearing in the 13th and 14th centuries." [2] How was it possible, then, to employ a legal machinery, which was in the hands of a free, self-governing community, to reduce that community to servitude, — a servitude from which they began forthwith to recover?

That there was an intimate connection between the anti and post-Domesday periods there can be no doubt, but it is somewhat difficult to find in the latter period the subjection of a body of freemen to legal slavery, unless one approaches the subject with the assurance that "the Conquest must have worked toward servitude," and with a lingering preconception of the character of the freedom which *must* have characterized the entire Saxon race. Of course it

[1] Pleas of the Crown for the County of Gloucester, Introd. p. 370.

[2] Ibid. p. 80.

may be asserted that there *may* have been "elements of freedom bequeathed by history but ignored by Domesday," and that rent *may* be, in some cases, "an original incident of tenure," and there may be cases given in which the tenant became degraded; it may even be, as Professor Vinogradoff has wisely intimated, that the "social evolution in this particular curve is a wavy line," but the broad fact remains that in this particular curve, from Domesday onward, events made towards freedom. One of the most striking evidences of this will have been established if the conclusion at which Mr. Vinogradoff and Mr. F. W. Maitland arrived independently, prove true, viz., the late evolution of the Court Baron, or manorial court of the freemen, as distinguished from the customary court of the servile tenants.[1] If to the earlier manorial court, the *halimote*, there grew up an additional court, which was more distinctly the court of the freemen, it would be what might be naturally expected from the growth of that element of the social organization.[2]

[1] Pleas of the Crown for the County of Gloucester, Introd. p. 364.

[2] If this late evolution of the Court Baron should be fully established it would destroy the inference of a "duality of the primitive settlement" from the "duality of the manorial court." Cf. Earle, Land Charters, LXIII.

Great stress is laid upon the existence of "free" tenants in the village community, the attendance of "freemen" upon the court, and the existence of ancient freehold alongside of tenements that have become freehold, as showing that "the manorial element is superimposed upon the communal."[1] It would help us in understanding the difficult problem if we could know just how much servile labor, just how many servile exactions, just what disabilities might rest, in any given period, upon one who could be called technically free. And then if we could add to this a knowledge of just what proportion of the entire population might bear this title, we would be still nearer the solution of the problem. The escheat of tenant holdings to the lord; the fact that the villain holding remained undivided, and did not admit of partition by sale or descent; the custom of "Borough English"; and the return to a lord of a holding on the death of a tenant, and its regrant by the lord, all have been regarded as marks of a servile condition. But Vinogradoff would not see in the last, evidence of ownership by the lord, but would look upon its return and regrant as merely a public official act, to show that the "true owner re-entered into the exercise of his rights."[2] He illustrates

[1] Cf. Earle, Land Charters, LXIII., p. 408. [2] Ibid. p. 371.

the point by the Salic law, which provides that when a man wants to transfer his property to another — mark the evidence of the existence of individual property in land in the Salic law — he calls a third party and puts into his hand a rod to signify that he gives up all claim to his property, and this third man, after certain acts symbolical of the ownership he has acquired, gives the rod to the second man, the real grantee, who is thus publicly clothed with proprietorship. So, says Vinogradoff, the lord or his steward is just this third man, who has come to be the one who officially represents the survival of the practice. But the illustration proves too much. If the lord of the manor has encroached upon the village community and monopolized its rights, then it was the absolute return of the lord's property into his hands on the death of his serf; if it was merely an official act of the leading citizen to give public sanction to the act of two citizens, private, and not communal ownership, had been the original regime, of which this is a survival.

Yet it is when Vinogradoff goes farthest away from the evidence, which he has worked over with such care, and nearest to the original arguments for the "mark" theory, that his conclusions in regard to an original free village community are announced

with greatest confidence. After all, it is "the open-field system"[1] which is "in glaring contrast with the present state of rights in western Europe," which is the basis of the conclusion that the mark must have existed.[2] "It is evidently communal in its essence." "Rights of common usage, communal apportionment of shares in the arable, communal arrangements of ways and times of cultivation — these are the chief features of open-field husbandry, and all point to one source, the village community." Yet it is very evident that this does not touch the main question, "Was it a dependent or a self-governing community?" Was individual ownership of land or communism the basis? "But there is absolutely nothing in the manorial arrangement to occasion this curious system,"[3] by which it is evidently meant that it was not necessary that tenants on an estate should be assigned intermixed strips, and that

[1] It is the "open field" all through the discussion which forms the "backbone" of the theory, though it furnishes no proof of the economic relations of the holders in it. Elton remarks, "Our common-field system points to a time when all the arable land was held in undivided shares, or was divided periodically by lot." Origins of English History, p. 405. This seems to suggest an inference as to the economic and political condition of the holders which is hardly justifiable.

[2] Ibid. p. 399.

[3] Villainage in England, p. 399.

these should be arranged in classes of holdings of equal size. "It is not a manorial arrangement, though it may be adapted to the manor." Yet the same may be said of the community of equal freemen. There is "absolutely nothing to occasion" a body of equal freemen adopting such an awkward system. One might expect all the holdings to be of the same size, or at least capable of producing the same amount, and surely there would be no advantage to freemen over serfs in having intermingled strips. As is said, "the intermixed strips and individual bundles of equal size find their explanation in agricultural necessity," and that necessity is at least as likely to arise in a group of dependent as in a group of self-governed cultivators. But after all, these conclusions from open-field cultivation are not closely connected with the great body of Vinogradoff's investigations, which, upon the whole, must form an important element in the reconstruction of the history of that period in which the picturesque "mark" has found so important a place. It is, indeed, a little strange that he should have left the mass of documentary evidence, which he has collected with so much care, to come down to the "open field" for the basis of his most positive "conclusions."

The growth of this tendency toward the modification of the old theory is apparent in the monograph of Professor C. M. Andrews.[1] With great truth the author of this monograph points out the fact that the philo-Germanist historians have clothed the ancient Teuton "with those very attributes which the political ideals of the first half of the 19th century were seeking to make real."[2] It is interesting to observe his conclusion, drawn largely from a study of the Anglo-Saxon period, that the freeman "did not have full freedom of movement, nor of contract," and that "his degradation was jurisdictional and economic,"[3] notwithstanding the fact that he enjoyed "political" freedom. Undoubtedly an advance will have been made when the question is shifted from its form, "were the body of the population of England from the Saxon conquest freemen or serfs?" to its juster form, "what was the condition of the great mass of the population?" and when the attitude of historical impartiality shall be preserved not so much toward the historians as toward history. We may continue to juggle with the terms "serf" and "freeman"

[1] The Old English Manor (1892). Published in the Johns Hopkins University series.

[2] Ibid., Introd., p. 3.

[3] Ibid., Introd., p. 67.

without getting any truer conception of the social evolution of the race. That the period in question was characterized by "freedom" in the modern sense, and "democracy" in the modern sense, would now scarcely be maintained; but whether, throughout all this period, there has been a steady growth from the really unfree to the free, is certainly a problem worth solution. It is a part of the larger problem of the development of the race.

V.

SUMMARY.

IT is easier to tear down than it is to rebuild, and it must be admitted that the results of the investigations with which the names of Fustel de Coulanges and Seebohm are inseparably connected have been more largely destructive than constructive. Objectionable as it is for historians to have to be classed as Germanists or Romanists, it is evident that the results thus far are such as to cast grave doubt upon Stubbs' somewhat extreme statement, that "from the Briton and the Roman of the 5th century we have received nothing." [1] On the other hand, so far as the continent is concerned, there is reason to believe that the influence of the Roman villa system penetrated early within the German lines and contributed powerfully, together with the inherent feudalistic tendencies of the Germans, to develop the feudal system. The same tendencies that contributed to reduce the earlier *colonus* to a prædial serf within the Roman *limes*, also no doubt

[1] Select Charters, Introd., p. 3.

received a benefice from his weaker free and land owning neighbor on a similar condition. The practice of commendation [1] in some powerful cases the return for such protection afforded by the protector which the age demanded, and the corresponding practice of benefice, by which land was conferred upon followers in return for services and on condition of similar subjection, no doubt were elements of the highest importance in building up the great feudal estates and in establishing firmly the feudal system.[2] Similar influences were no doubt in operation in England. And it is quite probable that, without accepting the extreme statements of Guizot, who errs as much on one side as the so-called Philo-Germanists do on the other, the Roman influence established by four centuries of occupation did not suddenly cease; that the Saxon conquest did not leave England a *tabula rasa*, so far as the Britons and Romans were concerned. In fact

[1] The Salic law in regard to commendation, Tit. LXII, 1. "Si quis alteri ayream terram suam commendaverit."

[2] It would be a great mistake to think of all manorial estates as large. No doubt there were many free land owners cultivating with few serfs or none and possessed of small estates. Many of these were no doubt swallowed up by the feudal system, but even in Domesday we find great diversity in the size of manors, and many of these have a very small villain population upon them.

the evidence seems to accumulate that both these races must be taken into account in the 'making of England.' No doubt the "multitude of castles" throughout the country, of which Bede speaks,[1] as well as the Latin speaking class of people of which he tells us, indicate the late survival of the Roman system.[2] But in addition to the evidences of a large production of corn in Britain during the Roman occupation, and of a large number of permanent estates, Mr. Seebohm has adduced strong arguments for believing that the three-field system of agriculture was due to the Romans, and that it did not exist in that part of Germany from which our ancestors came.[3]

[1] "Erat et civitatibus quondam nobilissimis insignita praeter *castella innumera* quae et ipsa muris, turribus, postis, ac seris erant instructa firmissimis." — Bede, Eccles. Hist., Bk. I. ch. 1. The language of the texts, as well as his explanations elsewhere, render it hardly possible that only fortified camps were meant.

[2] Bede, Bk. I, ch. 7.

"There can be no dispute as to the high civilization which Britain had attained in the second and third centuries. It had been settled like other Roman colonies, and imperial officials had directed the development of its resources." — Cunningham, Growth of English Industry and Commerce, I, 52.

[3] For evidence of the agricultural occupation of Britain by the Romans and the continuation of the Roman influence, see Scarth's interesting Chapters xviii and xix, and Appendix i, ii, and iii, in *Roman Britain.* Skene's *Celtic Scotland* contains interesting material on the same subject.

Similarly it must be admitted that he has pretty nearly made out his case in regard to the origin of the open field with its intermixed strips, viz., that it is due neither to the Saxons nor yet to the Romans, but was adopted by each as they found it, — a position in which Gomme is in substantial agreement with him.[1] Seebohm pushes back this system into the period of the tribal organization of the Britons, and finds its origin in "agricultural necessity," in the custom of "*coaration*" or joint ploughing, in which those uniting in it each furnished a certain portion of the plough team of eight oxen, or the laborers, or the irons or woodwork of the plough. But into a discussion of this it is not our purpose to enter. It is enough that it was not brought to England and established by the 'Teutonic mark.'

And further back we are not ready to go. The investigation of tribal conditions is but beginning. Valuable contributions to the study of tribal life and tribal organization, so far as the British isles are concerned, have already been made notably by Maine, Skene, Sullivan and O'Curry. But these do not afford sufficient grounds for generalizations as to England, much less for the entire human

[1] Gomme, Village Communities.

race. The probability is that with fuller knowledge, just as has occurred in the biological sciences, the line of demarkation between species will gradually disappear, and the continuity in the stages of development, from the tribal organization to the feudal system, will become evident.

Full account must always be taken of the complex forces which have effected this development. It is useless and unreal to attempt to discover, in the development of the English people and the English constitution, an unmixed line of descent. Account must be taken of the ancient Britons with their tribal system and modes of cultivation, as well as of the ancient Saxons with their tribal system. The effect on soil and people and social organization of the Roman civilization cannot be ignored. The effect of the Romano-British agrarian system and the remnant population upon the conquering Saxons in that particular stage of their development, must be taken into consideration. Scarcely anything is yet known, but much must be known of the exact nature of the Danish influence.[1] It is possible, even, that we may not yet have correctly estimated the force and

[1] For an interesting chapter on the Danish influence, see Cunningham, Growth of English Industry and Commerce, I, 83, et seq.

direction of the Norman influence.[1] And certainly the effect of the christian doctrine, that all mankind are descended from a common father, and that all alike owe allegiance directly to God, a doctrine which by the 14th century had filtered through even to the lowest class, must not be lost sight of in estimating the growth of the freedom of the great mass of the people. It is very poetical, no doubt, to trace our modern liberty to a single source in that much-be-praised "German forest," but it is not scientifically adequate.

It is not overstating the case to say that the evidence for a free self-governed village community, practicing communal ownership of land and forming the fundamental unit upon which all Teutonic society rests, and out of which it arose, is insufficient to establish the existence of such a community upon English soil or, for that matter, upon that of Germany. On the other hand, the non-existence of such an institution is implied not merely by the absence of positive evidence of its existence, but by the known facts in regard to an aristocratic social

[1] Cf. the remarks of Professor Channing, on the various influences affecting the development of English institutions, in The Genesis of the Mass. Town, p. 79, et seq. Also, Elton's Origins of English History, p. 2.

structure, in regard to the private ownership of land, and by what we know of the 'curve' of social evolution. In its slow sweep for the past thousand years we see the great mass of cultivators, who were under obligation to labor for almost, or quite, half the year at the will of the lord, who were subject to servile payments and degrading exactions, who were bound to the soil, gradually and painfully carried forward to freedom from such degradation with the undisputed right to freedom of movement and freedom of contract. As far back as we can see beyond this, rank and wealth and serfdom and inequality and great landed estates are everywhere to be found. It is not unfair to infer that the same curve sweeps backward through the slowly changing system of cultivation to its beginnings in tribal settlement.

If there were no other consideration beyond the continuity of ideas, this alone would lead to a suspicion in regard to the mark as a "necessary stage of development," or as a necessary "connecting link" between institutions so distinctly similar as the feudal system and the patriarchal system, from both of which it differs so essentially. The mark, with its 'independent freeman' who has 'never bowed his neck to a lord,' who is the 'equal' of all other markmen, is conspicuous for its *individualism* as well as its

communism. Its democracy, coming as it does between the patriarchal and feudal regimes, and in a warlike period which presented so many opportunities for centralizing power, is hard to account for.

It may be gratifying to some to trace the origin of the English race by a line of unmixed descent in blood and institutions, and to find the origin of our liberties near the cradle of the race, but the historian must be indifferent as to whether he finds them there or not, and his attitude must be one of inquiry as to whether the English really was so unlike all other races that this can be done. It has been one of the strong characteristics of the English people to attach great importance to precedent. At every step in the advance in liberty, from the demand for the enforcement of the laws of the 'glorious Edward' to the American Revolution, it has been proclaimed to be the ancestral rights of Englishmen. From the Conqueror to Victoria the prerogatives of royalty have never been infringed upon, but the people have merely *recovered* their rights. The man who is in sympathy with an ever-advancing society will perhaps say, "Let them think so; let them believe that these rights are ancestral, if thereby human liberty is increased." But the historian will say, "Let us seek for the facts; find what grounds you may for your progress."

VI.

THE MARK AMONG SAVAGES; PREHISTORIC AND MODERN.

WE have already mentioned the very much wider extension of the village community theory than that which was originally contemplated. From its position as a Teutonic institution with Teutonic freedom, which was thought to be unique, it is made first an Aryan,[1] and then an universal

[1] For some criticism of the attempt to liken the Indian village community to the theoretic mark, see note A, p. xliv, in Ashley's Introduction to Coulanges' Origin of Property in Land. Professor Ashley remarks: "At no stage of Indian agrarian history do we find the village community of theory, which is 'an *organized, self-acting* group of families exercising a *common proprietorship* over a definite tract of land' (Maine, *Village Communities*, pp. 10, 12)." "Where the cultivating group are in any real sense proprietors, they have no corporate character, and when they have a corporate character they are not proprietors." See, also, Professor Montague's review of Baden-Powell's *Land System of British India*, in English Hist. Review, April, 1893. Vol. VIII, p. 392, Mr. Montague sums up: "In neither type of village, according to the author of this book, is agrarian, as distinct from joint family ownership, to be found. Nor, in his opinion, is there any evidence to show that at any former period the body of villages held the village land in common. He considers that the raiyatwari type of village, the village

institution. The natural result is, that from being an institution intermediate between the feudal on the one side, and the tribal and patriarchal on the other, it is pushed further back until it becomes peculiarly a tribal institution. Examples are sought to establish its universality among such primitive races as the North American Indians, the Patagonians, the Fijis, the Basutos, the Dyaks, and the "peaceful, Arafuras." "The village community is thus presented to us as a primitive institution, having a prominent position among the backward races, and a subordinate position among the advanced races."[1] This later tendency to discover traces of the village community in all races which have not yet escaped from barbarism, of course shifts the question entirely, and places it where its answer must rest upon a larger knowledge of tribal conditions and savage races than we as yet possess. But

in which separate property prevails, is the more ancient type of the two. . . . But none of these forms are analogous to the Russian *mir*, to the South Slavonic *house community*, to the Swiss *allmend*, or indeed to any rural organization in Europe."

[1] G. L. Gomme, The Village Community (1890), p. 16. Attention has been called to the radical difference which the presence of the chief in the savage communities cited by Gomme would make in the mark theory. Cf. Ashley in Pol. Sci. Qr., March, 1891.

even here the question must be approached with some care. It will be easy enough to go back to a period "when private property in land was a struggling novelty," [1] when nomadic life was giving way to settled life. It ought not to be difficult to show that at any period, and among any races, civilized or savage, groups of human beings have settled together and placed their abodes on a definite portion of the earth's surface, that they have cultivated a bit of soil about their "village," and that they have made more or less use of the uncultivated soil lying around this; and when these are dignified by the terms "village community," "arable land," "waste" or "common mark," it may sound like a newly discovered institution. Men will gather into groups as surely as wild animals of á kind. The propensity to herd together is strong in this particular animal, man. There will surely be a certain concert of action among the members of such a group. They will adopt such an economy as their previous habits and the exigencies of the case require and admit of. The similarity of the needs, of the powers, of the relations to external nature under which such groups are formed, will undoubtedly be paralleled by a considerable similarity in their economic arrangements.

[1] Pollock's happy phrase. — Land Laws, p. 2.

But inductions from these facts as to the existence of a definite, social and political institution, whose existence has been co-extensive with the human race, must be accepted with caution. Meanwhile the science of ethnology will be affording us a broader basis for generalization.

VII.

THE MARK IN AMERICA.

ANOTHER and still broader conception has been evolved from the village community theory. This is no less than that the principle from which it springs finds its seat deep in human nature itself,[1] and is ready to become active whenever conditions are favorable. For what else can be the meaning of the appearance of the Germanic mark upon American soil, the discovery of which has been hailed with so much delight? Of course the English people had passed through the bondage of the feudal period. Of course generation after generation had lived and died, knowing nothing before or behind them but serfdom. Of course all knowledge of that primitive democracy, in which there was no such thing as the private ownership of land, had not only passed out of memory but was not apparent in the hidden documents of a forgotten tongue. But deep down in the inner consciousness of the race, transmitted in some mysterious way from generation to generation, and uncorrupted by an outward environment, the prin-

[1] Germanists would perhaps say "Anglo-Saxon" nature.

ciple was preserved. The moment it is surrounded by favorable conditions in a new continent, sweeping away the traditions of a thousand years, it leaps forth and bears sway in the hearts of men just as it did ages ago in the gloomy forests of Germany. Surely, here are the traces of a primitive institution worth considering.

But what are the evidences upon which the able and conscientious historians, who have told us that the early settlers in New England reproduced the Germanic mark, have based their conclusions? One would naturally expect that a mature man would bring to a new colony with him the same ideas in regard to property, the same ideas in regard to government, the same methods of administration, the same economic notions, the same habits which had been wrought into him during his previous life. If he *did* differently in the new settlement from what he had done before, one would naturally suppose that this was due to his new environment. Not something in *him*, but something in *it*, would lead to the adaptation of old modes of thought and action to the new conditions. But we are told that these new conditions have had the effect of bringing out of the settler the methods of the remote past, which had hitherto lain unsuspected. "The colonists go back

a thousand years and begin again," we are told.[1] Even in the choice of name, it is said, they "returned unconsciously to the usage of Ine and Whitraed,"[2] in that they describe these settlements by the words town and township which are but the ancient *tun* and *tunscipa*. But why it is thought necessary to regard these words, which were perfectly familiar to every Englishman, as a return to Ine and Whitraed is not apparent.

Of course every fact which goes to show the direct continuity of the institutions which were established in the new world with those of the same people in the old world, is full of interest. It is extremely helpful, too, to consider how these were modified by the peculiar character of the people and the physical conditions of the new settlement. These new conditions must react upon the character of the settlers, and it is interesting to note the effect of such reaction. All facts bearing upon such a stage in the development of institutions must be welcomed. As has been wisely remarked, "There is much to learn by the study of the local beginnings, agrarian and economic, of these United

[1] Howard, Introduction to Local Const. Hist. U. S., Vol. I, p. 51. Cf. also, Johns Hopkins Univ. Studies, Vol. I, p. 15.

[2] Ibid. p. 52.

States."[1] But when it is asserted that the effect of such reaction is practically to cause a return to the institutions of a thousand or fifteen hundred years earlier, when it is implied that the influences which have been operating during all these centuries are insignificant in comparison with the vital principle which has been lying dormant, waiting for an opportunity to burst forth, then it must be said that this is an application of the doctrine of continuity for which we are hardly prepared. Professor Channing, whose studies of colonial institutions entitle his opinion to the highest respect, says, with great truth, that "there are no sudden breaks in the history of the English race."[2] But a return directly to the institutions of the times of Tacitus and Hengist and Horsa would be such a break, and it is certainly not presumption to question that interpretation which is put upon facts which would render such a conclusion necessary. At least, where it is undertaken to establish the reappearance of the Germanic mark in America, it cannot be out of place to suggest that it would be well to wait until we have a little more definite knowledge in regard to the character of that institution. May it not, in

[1] Adams, Germanic Origin of New England Towns, p. 38.
[2] The Genesis of the Massachusetts Town (1892), p. 75.

fact, be premature to attempt to reconstruct the entire constitutional history of America on the basis of the Germanic mark, while the very existence of that institution is in dispute and growing doubt? If, on the one hand, its non-existence as a Teutonic institution should be accepted, or, on the other, the village community should be shown to be a universal form, through which all tribal organizations pass, and in no wise a peculiarly Teutonic institution, much of the laborious comparison might be found to be in vain.

But even if we should be assured that the Germanic mark did exist, and that its characteristics were those which have been attributed to it, the methods by which it is sought to show that it reappeared on American soil are not those which commend themselves to the scientific investigator. It is the peculiar task of the scientific investigator to seek for realities underneath the forms in which these may be clothed. A mere similarity of words is to him at once a danger-signal. Yet it has been one of the peculiar features of the discovery of the mark in America that it has rested, to a considerable extent, upon a phraseology which has become popular in the discussions of the mark theory, and has been comparatively unknown in ordinary usage.

Even one of the first to call attention to the subject, Professor Herbert B. Adams, of Johns Hopkins University, in that charming paper on "The Germanic Origin of New England Towns," makes use of a terminology which *suggests* the comparison, and other writers have erred still more gravely in the same direction. It is no longer proper in these discussions to speak of the village, but the "*village community*," while the area occupied by house-lots and streets must be called "*the village-mark*."[1] The cultivated lands about the village must now always be described as "*the arable*" or "*the arable mark;*" while nothing less than "*the waste*" or the "*common-mark*" will satisfy us by way of description of the uncultivated lands, of which, usually, there was a great abundance. Everything that the villagers or joint-proprietors do together is described as a "communal arrangement," or evidence of a "communal idea." Their meetings are "folk-moots." "Common" and "communal," "free" and "freedom," suddenly occupy great space in the description of the settlements. Besides the phraseology, which is supposed to show the striking similarity of the New England settlement to the "primitive Teutonic

[1] Cf. Howard, Local Const. U. S., p. 53: "Everywhere in New England appeared the house-lots or village mark."

mark," many actions of the settlers, which were those that common sense would dictate under the circumstances, are made to suggest the same thing. Everything which can be called "communal," or which resembles a fact or theory of which we are in possession concerning the ancient Teutons, is "derived from the forests of Germany."

Mr. Herbert Adams quotes, as illustrative of the return to the Germanic habits, Mourt's relation, in which we are told that the Plymouth Pilgrims selected for settlement a piece of high, dry ground which had already been cultivated, and which was near a spring of good water. Now a group of men from Timbuctoo would have done no less. A herd of cattle on our western plains would congregate on a pasture of high, dry ground, near plenty of good water, if they could find it. Even if we quote from Tacitus, "*colunt . . . ut fons, ut campus, ut nemus placuit,*" we do not make this very natural selection of the settlers due wholly to a Teutonic impulse. Then, naturally, they all went to work with a will to get things in readiness to protect themselves from sufferings and dangers, known and unknown. They worked together — note the "communal" action — to get the hill ready for the ordnance and for their buildings. They erected a "com-

mon" house (20 ft. square) for their "common" goods. They laid out a little tract, which allowing for the "common town street," must have been about 125 × 400 ft., in which "family allotments" are made, each of which was 50 ft. deep, and whose width was regulated by the very *un*Teutonic principle of the number of *individuals* of which the family is composed. Thus, we are told, "on this tract of cleared land or the village mark, near the spring, which, like the springs spoken of by Tacitus, etc., arose the first town or village community in New England."[1] "The land was taken possession of as communal domain, and the first labor bestowed upon it was communal labor. But the Pilgrims knew well that a principle of individuality must enter into the development of communal life. Like the Teutons, the Pilgrims regarded the family as the unit of social order. . . . Like the Teutons, the Pilgrims took up land in proportion to their numbers. . . ."[2] That is, in order that they might get everybody inside the little area on which they built, they reduced the number of "families" to nineteen, and then allotted three poles deep and half a pole wide — 8¼ × 50 ft. — for *every individual* in the family.

[1] Germanic Origin of New England Towns, p. 25.

[2] Ibid. p. 26.

But, we are told, "an old Teutonic idea appears in the notion of fencing and impaling," which the settlers proceeded to do, for it is well known that "the radical idea of a town is that of a place hedged in." Little did our Pilgrim forefathers realize what they were doing. They no doubt thought that they were constructing a stockade against possible attack from savage beasts or men. They were, in fact, reconstructing one of the fundamental institutions of the Teutonic race. Even gathering wood in the primeval forest was a "good old Teutonic fashion," and the cattle pound, which the settlers at a little later period found necessary, was a "communal idea." In fact, "Plymouth was settled upon communal principles of the strictest character," [1] which were due neither to copartnership with the London merchants nor to a spirit of Christian brotherhood, but *must* have been "inherited from Saxon custom." The settlers who established Salem, in like manner, "found already cleared for their use what the ancient Germans would have termed a mark. Here they found *camporum spatia*, the wide, extending spaces, in which, according to Tacitus, the Germans found division of land an easy matter. There can be little doubt that the first settlers of Naumkeag found here

[1] Germanic Origin of New England Towns, p. 33.

as good an opening as did many German villages in the Black Forest or the Odenwald."[1] But when, to establish this reappearance of the Germanic mark upon American soil, our attention is directed to the fact that the settlers, 'just as the ancient Germans,' did not build all their houses together with a continuous wall, and we have quoted for us with gravity the words of Tacitus, "*vicos locant, non in nostrum morem, connexis et cohaerentibus aedificiis; suam quisque domum spatio circumdat*,"[2] we are ready to exclaim, "What need we any further witness?" In view of the fact that we have such a remarkable reproduction of ancient institutions, it is to be regretted that our information in regard to them is not more complete. For instance, when it is asserted that "the New England town meeting is the 'moot' of the Anglo-Saxon 'tun,' resuscitated *with hardly a circumstance of difference*,"[3] we see what a flood of light it would throw on the town meeting if only our knowledge of the Anglo-Saxon 'tun' were more adequate. It ought to inspire us with a pro-

[1] Adams, Village Communities of Cape Ann and Salem, p. 14.

[2] Ibid. p. 31.

[3] Howard's Introduction to the Local Constitutional Hist. of the United States, Vol. I., p. 55; quoted by Hosmer, Anglo-Saxon Freedom, p. 9. The italics are mine.

found respect for our ancestry to learn that "all America lay in that ancient home."[1] We are told that the Plymouth settlers did so and so, "and, lo, when all was done the little settlement was through and throughout, as to internal and external feature, essentially the same as an Anglo-Saxon 'tun,' such as a boat-load of the followers of Hengist or Cedric might have set up as they coasted searching for a home along the isle of Thanet — or further back still, the same essentially as a village of the Weser or the Odenwald, set up in the primeval heathen days."[2] And so, *mirabile dictu*, we find the reappearance of the same ancient "communal ideas," the same economic arrangements, the same political institution, which neither all the forces of the "effete Roman civilization," nor the feudal system, nor the Christian doctrine, nor anything else had been able to change or destroy. And if, unfortunately, the settlers had not belonged to the party which soon came to be called "roundheads," there is little doubt but that we should still have found the "long hair proudly floating over a neck that had never bowed

[1] Hosmer, Anglo-Saxon Freedom, p. 10.

[2] Anglo-Saxon Freedom, p. 116. Mr. H. L. Osgood, in the Political Science Quarterly, March, 1891, has pithily said: "The New Englander of to-day differs from his ancestor in Schleswig by the experience and training of fifteen centuries."

to a lord," which, we are assured, was one of the striking characteristics of the free Saxon. Is there not a danger lest our boundless admiration for Anglo-Saxon freedom and Anglo-Saxon institutions, and our desire to trace a pure descent in blood and institutions, may lead us to put an interpretation upon history which may be described as verging upon sentimentalism? No single principle can endure unmodified, or is sufficient to account for social development. We might assert that the legend,

> "In Adam's fall,
> We sin-ned all,"

accounts for all the ills that human institutions are heir to; but it is not in such assertions that the chief value of the doctrine of historical continuity is to be found. Constitutional and economic development is infinitely complex. It proceeds in the lives of men. Character is a more important element than environment in the new settlement. There is absolute continuity. There are no leaps forward or backward. All the forces within and without, social and physical, are to be considered. And they will effect change in character and institutions. The follower of Alfred must be different from the follower of Hengist. Wat Tyler is not the same as the villain of Domesday. But the Puritan of New

England is the same as the Puritan was in Old England a month ago, before he set out to America. And he brought essentially the same institutions as those which he left. What there is new in them, what there is progressive, is to be attributed to the influence of new conditions upon him and upon them. His notions of property have not changed, his conception of liberty is the same, his religious beliefs and superstitions remain as they were, his narrowness, his bigotry, his sturdy character, his devotion to duty, his remembrance of self-interest even in "communal" arrangements, are quite as they were before. And if we would trace all the things which entered into his character and his institutions, we would have to remember the English Bible and Wyclif and Augustine and the Roman Law, and the doctrine of 'natural rights,' and villainage and several other things, quite as much as the unruly tribes which Tacitus describes. And the beginning of the task will be in the examination of the evidence immediately before and immediately after emigration. Neither side of the evidence will by itself be sufficient.

There can be no other than a feeling of profound respect and even of gratitude to those who have sought to interpret American institutional history in

the light of the supposed Germanic mark, for their contributions to a better knowledge of the development of American institutions, however much we may believe their works marred by a one-sided interpretation of facts. Yet, while there are many things peculiar in the character and conditions of the New England settlements, it is hardly possible to find in them any of the distinguishing characteristics of the Teutonic mark theory which may not be otherwise accounted for.

In the first place, it is not worth while to consider as evidence bearing upon the survival of the Germanic mark, all those things which are due merely to the fact that we are human beings and dwell together. These things the Puritans did, so far as necessary, in their English homes; these things any other race of men would have done if thrown into similar circumstances. Nor is it worth while to consider those things which are due simply to human intelligence and the ability to adapt one's self to an emergency. In so venturesome an enterprise, it was natural that the ingenuity of the settlers should be called into play to enable them to "make the best of the situation." But these things are perfectly obvious. On the other hand it is safe to affirm that the entire body of settlers of New England was permeated

by the notion of *the individual ownership of land.* The most fundamental of all the principles of the supposed Germanic mark was wanting, viz., that there can be no ownership of land. This is made, and is, in fact, the most fundamental conception of the theory. It is made, — and is — entirely distinct from the notion of joint ownership by two or more proprietors. The operation of partnerships or corporations exercising a joint control over their properties was sufficiently well known in the 17th century. Temporary makeshifts in settlement, or even arrangements which, under the stress of the conditions of subduing a wild country, were maintained for a considerable time, are not to be regarded as exhibiting the fundamental principles of organization. Not only had the settler no other intention than that of becoming the private owner of landed property, but "the private law of real property in New England, was, in the main, that of the mother country."[1] It is not the mere fact of the unbroken succession of the titles from the crown through the Plymouth Company, the Council of New England, the Massachusetts Bay Company, the General Court, the township or individual,

[1] Egleston, Land System in the New England Colonies (1880), p. 45.

but the more important fact that the people expected to and did own their own lands, whether divided or undivided which proves this. That in some cases there were settlements without due authority, is nothing to the purpose, and such irregularities did not long continue.[1] Land ownership was, indeed, a fact of almost fundamental importance in the New England settlements and governments.

The "equality" of the ancient "mark" is not apparent in the settlement of the new world. As it has been well put, "In the division of the soil our ancestors were guided by no visionary theories of equality."[2] We find the amounts of land granted to individuals varying from small house-lots to tracts of 3200 acres, though large grants were exceptional, and were usually made in payment of advances or of services.[3] While the grants were kept designedly small, they were designedly not equal.

The combination of commercial, religious and political elements makes it somewhat difficult to

[1] "After 1640 no one was permitted to settle on the vacant lands within the chartered limits without permission." Channing, Town and County Gov't in the Eng. Col. of N. A. (1884), p. 24.

[2] Egleston, p. 145.

[3] Ibid. p. 19.

assign to each its relative importance. An element that cannot be overlooked is thus stated: "But in point of fact and legal conception, it (the charter of King Charles of 1629) merely brought into being an English commercial organization — in other and modern words, it was a 17th century act of incorporation, and as such in no way peculiar." "It was a trading company, in which provision was made for the establishment, and, incidentally, for the government of a plantation in an uninhabited land. And this trading enterprise, involving a real estate speculation, resulted in a Commonwealth."[1] The same author adds, "The act of commercial incorporation was almost immediately converted into something very like a civil institution."[2] But while this statement calls attention to an important truth, especially so far as the origin of the land ownership is concerned, and in a less degree to the early mode of administration, it bears the impress of a failure to realize the true purposes and controlling influence of the settlement. It was not, primarily, a land-jobbing enterprise. If the form of a commercial organization was taken, it was but an artificial

[1] C. F. Adams, in "The Genesis of the Massachusetts Towns," p. 28.

[2] Ibid. p. 30.

method of accomplishing the real purpose. The authority to exercise governmental functions which was a subordinate element in such commercial enterprises, in these cases became of the highest importance. The commercial aim sank into insignificance by the side of the aim to establish homes and institutions. Even the "commercial" form quickly gave way to the forms made necessary by the real nature of the colonization.

The form of organization, according to Professor Channing's view, depended on, "(1) the economic conditions of the colony; (2) the experience in the management of local concerns which its founders brought from the mother country; and (3) the form of church government and the land system, which should be found expedient."[1] The blending of the charter of a commercial company with the secular and church governments, with which the colonists were familiar, no doubt did largely determine the form of local governments. But some of the features of the system developed were, as has been suggested, due to the fact "that it was accomplished by *organized* colonization."[2] Both in the

[1] Town and County Govt. in the Eng. Colonies of N. A., p. 5.

[2] Egleston, p. 44.

transplanting of colonies from England and in the forming new settlements out of the old, this internal organization on the basis of ties of acquaintance, or religion or what not, and the external care and selection and direction by central authority, are facts of prime importance. For while the internal tie operated within certain limits, the external power was the source of the property rights, and prescribed the rights and privileges which should be enjoyed. In the case of the Massachusetts Bay Company, rights, proprietary and governmental, were granted to individuals and to groups. The "General Court" was the company's successor as the source of proprietary and governmental rights. "The General Court adopted the system of granting lands in townships to seven or more individuals who had, as a rule, the absolute disposal of the lands so obtained."[1] These persons, who formed the "freemen," or "commoners," or "proprietors" of the township thus organized, were the absolute owners of the tract, so granted, and the only future source of ownership for any part of the land was to be found in them.

The grants sometimes may have been large in proportion to the number of proprietors, and some-

[1] Town and County Govt. in Eng. Colonies of N. A., p. 24.

times were purposely large to allow for the increase of inhabitants due to children and servants, and perhaps also to new settlers that might be admitted.[1] There was perhaps sometimes a moral obligation resting upon the proprietors to make grants to new settlers, on the principle, "Freely ye have received, freely give." But there can be no doubt not only that the legal title rested with the original grantees but that it was in most cases claimed and exercised by them. The position of these original grantees is well stated by Mr. Egleston.[2] "The commoners were originally those to whom the General Court had made a grant of land in common for settlement, very often, as we have seen, without giving the grantees entire unfettered control. They formed, as has been held, a *quasi corporation* having the power of other corporations for certain specified purposes. The right of a commoner might be conveyed or inherited like other real estate, and one who thus became entitled to a right was not necessarily an inhabitant, nor was he necessarily entitled to vote in the town meetings where township privileges had been conferred upon the inhabitants of a plantation. On the other hand, it by no means follows that because a man was en-

[1] Cf. Winthrop's statement, quoted by Egleston, p. 26.

[2] Ibid., p. 29.

titled to vote in the town, he was also entitled to a voice in the control of the common lands, or that he had any right to them whatever. The land community and the political community were distinct bodies, capable of dealing with other persons and bodies and with each other as separate juristic persons. Thus we find votes of the town according rights to the proprietors, or even making engagements with them. The proprietors, too, might make grants to the town as to any other parties." [1]

When the proprietors and the inhabitants were identical there was sometimes a natural blending of their prerogatives as citizens and land-owners. The need for plow-lands and grass-lands, the cost of making and keeping up fences, and the haste necessary in constructing them in new settlements often led to the enclosure of lands together. "Necessity constraining the improvement of much land in common," [2] as the record puts it, several proprietors,

[1] Such a description is in striking contrast with Aristotle's categories of the possible forms of communism, which were, (1) the soil an individual possession, while its produce goes into a common stock, (2) soil owned in common while its produce belonged to the individual, (3) both soil and produce in common. — Republic, Book II, ch. iv.

[2] Conn. Col. Rec. I, 101, quoted by Egleston, p. 41. The "necessity" of making improvements in common for the sake of greater safety and economy is illustrated at a much later

or all the proprietors of the town, fenced one or more fields in common. But it is evident that in most of these cases there was not even joint ownership. We are told that the bounds of such lands lying in common were to be frequently perambulated by the particular proprietor and the boundary marks rigidly kept.[1] These plats of land could be bought or sold or bequeathed or subdivided. Bodies of land were sometimes held in undivided joint ownership, but joint ownership is no uncommon thing in any age of the world. In this case its management must necessarily take place by the body of its owners, who were styled "freemen," "commoners" or "proprietors," any one of whom ordinarily could dispose of his individual share. Even where the so-called "common" land under a single fence was held in severalty, it was natural and necessary that the group of proprietors should adopt regulations for the keeping up of the fence, the pasturing of the stock and other incidents of the management of a

date by a statute of Virginia recorded in Hening, Vol. X, p. 39, which says, "And whereas several families *for their greater safety* have settled themselves in villages or townships, under some agreement between the inhabitants of laying off the same into town lots, to be divided among them, and have from *present necessity*, cultivated a piece of ground adjoining thereto in common; *Be it enacted*," etc.

[1] Egleston, p. 42.

joint property. In such cases there is hardly any other method open than to submit matters affecting common interests to the decision of a majority of the proprietors, and it is not unnatural and by no means unheard-of that legal enactment should render such corporate action binding. If the enduring "life principle" of the village community is embodied in the proposition that "shareholders are subject to the will of the majority," [1] it can hardly be said to be a new discovery of the Germanic mark on the new continent. There are abundant illustrations of communal ownership and management from the earliest period of settlement to the present day, but in most cases these are but examples of what was already a common practice, viz., the joint ownership of an undivided but not undividable property.[2] In the methods of management of these joint properties, or individual properties under a common fence and common regulations, there is a strong likeness to the manorial regulations with which the settlers were familiar. Of course in many cases "commons" were given to towns, or were

[1] Germanic Origin of N. Eng. Towns, p. 37.

[2] It should be remembered that it is a fundamental proposition of the village community theory that the mark "belongs to the freemen as a whole, not as a partible possession." — Kemble's Saxons, I, p. 37.

provided for in the original settlement, a most natural outgrowth of manorial customs. The reservation of such a "common" or park by the founders of a modern city would be very natural, and yet would not imply any "return" to communal ownership of land. The specific reservation of "Five Hundred acres of land for public uses as for building of a Towne, Scholes, Churches, Hospitalls and for the maintenance of such ministers, magistrates and other local officers as might be chosen by the corporation,"[1] was very praiseworthy and natural and modern, but it is precisely the thing a community based on communal land holding would not have done. When it is said that "originally, the whole region round about the first settlement (of Salem) was common land,"[2] it must be understood in a different sense from the assertion that "all land is at first 'common land,'" as applied to the original occupation of the soil. As a matter of legal theory and of accomplished fact the lands of the original American settlements were the property of the crown, and passed from the crown to individuals or corporations, and from these to actual settlers either individually or in groups, and so by an

[1] Vill. Com. of Cape Ann and Salem, p. 1.

[2] Ibid. p. 36.

unbroken succession to the present holders. If there were "squatters" upon the lands during any period of their history, and if this occupation was allowed to grow into a pre-emptive right, it in no wise affects the question at issue; but simply illustrates the method by which occupation and use harden into a right to the thing so occupied and used. Indeed there is an instructive lesson in the method by which popular privileges grow which throws light backward upon the early history of the English. The struggle which was made by later comers, in various settlements, for control and ownership in the property of the original corporation, and the measure of success with which they often met by means of their greater numbers, are not without historical parallel. The struggle of the new comers against the original settlers, — the popular class against the wealth and aristocracy, — has been an important element in the development of more than one nation. We see in it how "common rights" grow. But however strongly we may sympathize with the result attained, or however much we may feel that the original incorporators were under a moral obligation to share their good fortune with the later comers, it cannot blind us to the fact that the triumph of the latter was simply a suc-

cessful encroachment upon the legal rights of the former.

One of the elements of the original commercial companies from whose legal rights those of the settlements sprang, was the governmental power, which the nature of the case rendered necessary. Circumstances soon gave to the governmental power an importance which reduced the commercial to insignificance. Fortunately, the granting of property rights passed into the hands of the General Court, and circumstances gave to this a strongly democratic character. Mutual fears and dangers, and above all, the overwhelming influence of the religious element, developed the closely-knit, compact, self-governed groups, which are so striking a characteristic of the New England settlement. The elements all existed immediately before the settlement. The combination of these, under the new conditions, produced phenomena which might, perhaps, be described as new, but of which the essentials were all old. A careful comparison of the English model with the American community at its beginning, may show that the differences are very slight. The "communal" features were those which were due to the loneliness and dangers of the wilderness, and to a strongly centralizing church

system; and perhaps, in a degree, to the example of the English manorial life. They were not due to communal land occupation. They were not due to any absence of individual ownership in land. The "equality" of the mark is not visible, either in land-holding or government. Even the democracy is not of that "idyllic" character which the mark theory presents.

The communal and the democratic features of the new settlement are, indeed, interesting. The mighty impulse given to the growing spirit of liberty and self-government in the English race by this American colonization cannot be overlooked. But it was merely a greater stride here in an advancement which was taking place more slowly, but none the less surely, there. The connection was unbroken. There was less to hamper it here than there. And in the movement was embodied all the elements which the race had gathered in fifteen centuries of progress, not the least of which were new conceptions of law, and a truer conception of the basis upon which all human liberty rests. The German democracy, such as it was, rested on a substructure of serfdom and slavery, and ignorance of the rights of man as man. The new democracy, whose coming the American settlements hastened, acknowledges

no such origin. If one wishes to trace the ever-widening stream to its sources, he will no doubt find that one slender brooklet heads in the German forest, but only one.

VIII.

THE MARK IN ECONOMIC DISCUSSION.

IT is, perhaps, to be expected that a healthy, normal individual, in the present day, will be in sympathy with the democratic tendencies of the age, and that he will rejoice in the triumph of the masses over the classes. But it is a curious fact, illustrative of a striking characteristic of the English race, that we cannot rest easy until we have the assurance of historical precedent. The triumph must prove to be the realization of some right or privilege of which we have long been deprived. It matters not if ages have passed over the buried right; all that is necessary is that the past should furnish a justification for its present existence. This conservative trait has useful consequences, but it ought not to prevent us from resting our demand for the better, upon the true, rather than upon the untrue. It is not likely that the course of human progress will be retarded by putting the "Golden Age" in front, instead of behind us, or by a popular knowledge of what the race is proceeding *from*, and what it is proceeding *towards*. If democ-

racy is the ultimate goal of mankind, let it be shown to be so from the nature and needs of man. If altruism ought to end in communism, there is no need of an historical example. If individual selfishness should give way to the public welfare, it is not because the history of mankind shows that it has heretofore done so. If individual ownership of land is an unmixed evil, let a demand for national ownership, or international ownership rest on its true basis. It should not be deemed necessary that such causes should struggle to get a foot-hold on the poor Teutonic mark, as a place of beginning. Yet, while it is asserted that "if it were true that land had always been treated as communal property, that would not prove the justice or necessity of continuing it,"[1] yet the assertion that the original form of permanent land-holding was communal is made to serve as the basis for the demand for what its advocates are pleased to call a "return" to communal ownership. "All land was once occupied and cultivated in common, therefore all land should now be communal," is the force of the argument. But if the premise rest on insufficient grounds, what becomes of the conclusion? Even when the premise has been admitted, it is not surprising that we should

[1] Henry George, Progress and Poverty, p. 331.

see it made the basis of directly opposite conclusions. On the one hand, it has been made the basis of arguments to show that the evolution of private property in land had been the means of advancing the welfare and prosperity of the human race, and contributing towards its highest development; and, on the other hand, to show that the only possibility of human advancement would be in the "return" to primitive, communal ownership.[1]

In the attacks upon the institution of private property in land, the charge that historically it had its origin in robbery, rests upon two distinct bases which are confounded. The one is that all the land originally belonged to all the people, and that some of the people have taken charge of some of it to the exclusion of the rest of the people. The other is that by war and conquest, and theft, the lands have changed hands in the course of the ages, and that hence the present ownership is unjust. Yet in the latter case the principle of ownership is not in question, but the possibility of undoing the results of a series of wars and restoring property to its rightful possessor. There could have been no robbery of the land by conquest if there had been no ownership to begin with. It is one thing to assert that the man

[1] Cf. Ashley, Introd. to Origin of Property, p. xliv.

who has stolen my pen-knife possesses it unjustly, and quite another thing to prove that ownership of pocket-knives is founded on injustice. Yet these two ideas are constantly confused. It is not this violent taking of property from one man by another man that is in mind when the "restoring" and the "returning" of the land to its original ownership is talked of. It is not that Jute robbed Briton, and Norman robbed Saxon that is complained of, and would be remedied; it is that any should have taken possession of and held for private use any portion of the earth's surface; and the "restoration" aimed at is the taking away of such lands from their possessor, and the bestowal in some way of their use upon all men. The "resumption of land as common property," which is so freely talked of, has nothing to do with the wars and conquests, which have been as destructive of property rights as of life, but looks back to a supposed condition of things before landed property began. "All land was in the beginning common land," we are told. "Common right to land has been everywhere primarily recognized, and private property is the result of usurpation."[1] "Everywhere the common right of men to the use of the earth has been recognized,

[1] George, Progress and Poverty, p. 332.

and nowhere has restrictive ownership been freely adopted.'[1] 'Historically private property in land is robbery.'[2] 'Everywhere has existed common property in which the rights of all were equal.'[3] 'The idea of individual property in land is derived from Rome.'[4] 'In all primitive society the soil was the joint property of the tribes, and was subject to periodical distribution among all the families so that all might live by their labor as Nature ordained.'[5] "*Une sentence qui veut servir de proverbe universel, et à une époque relativement récente, qui s'est universalisé la proprieté individuelle appliqué*

[1] George, Progress and Poverty, p. 333.

[2] Ibid. p. 333.

[3] Ibid. p. 333.

[4] Ibid. p. 335. Mr. George should not have forgotten Abraham's offer to the children of Heth. "I will give thee money for the field," and their reply, "the land is worth four hundred shekels of silver;" and the result, "and Abraham weighed to Ephron the silver, current money with the merchant. And the field of Ephron which was in Macpelah, which was before Mamre, the field and the cave which was therein, and all the trees that were in the field, that were in all the borders round about were made sure unto Abraham for a possession in the presence of the children of Heth before all that went in at the gate of the city." Genesis 23. But perhaps it was thought impossible to trace the continuity of the "idea" from a non-Aryan source.

[5] Laveleye (Prim. Prop., p. xvii, as quoted by George, Prog. and Pov., p. 334.

à la terre."[1] Laveleye again tells us that the exclusive *dominium*, personal and hereditary, applied to land is a fact relatively very recent, and that for a long time men knew and practiced only collective possession.[2] He tells us that the generally accepted theory of property must be reconstructed, because it rests on premises which are directly contradictory to the facts of history and to the conclusions to which these lead.[3] We are assured that the socialistic policy is but a return to the ancient order of things;[4] from which we are supposed to infer

[1] Laveleye, De la Propriété, p. 4.

[2] Ibid. Introd., p. xii.; cf. also Ibid. p. 380.

[3] Ibid. p. xviii.

[4] "L'idée socialiste est chez nous un heritage de l'ancienne regime . . . cette façon d'entendre la liberté n'est pas née des prédictions modernes, ni des promesses des démagogues, ni de l'abus de la presse; elle procède de souvenirs et de traditions que rien ne peut effacer." — M. Silvela, as quoted by Laveleye, Ibid. p. 338. "Communal property . . . was an old Teutonic institution, which lived on under cover of feudalism." — Karl Marx, Capital (translated by Aveling), Appleton ed. 1889. The same assumption of the original communal ownership of land by Teutonic society is evident throughout Marx's writings. The same assumption is to be seen in Fr. Engel's Preface (1883) to the manifesto of the Communist League . . . ". . that accordingly (since the dissolution of the primitive common property in land) the entire history is a history of class struggles — struggles between exploited and exploiting, ruled and ruling, etc." — As quoted by Kirkup, History of Socialism (1892), p. 160.

that, therefore, it should receive ready acceptance. We are told that most jurists and economists "have established ownership on hypotheses contradicted by history, or on reasonings whose necessary conclusions must be in opposition with that which they wish to show,"[1] all of which, if true, would place the rights of property on a slender foundation. But in this statement there lurks a suspicion of that most mechanical supposition, which one finds not at all infrequently, that property is somehow the creation of the lawyers and the theorists. It is the creation of the race. Lawyers and theorists have just about the same relation to it that grammarians have to language and literature. It may, indeed, be affirmed that the race has made a mistake in developing this institution, but this must appear on its own grounds. It is not surprising, considering the tremendous conservative force of an institution resting on the theory and practice of the race for ages, that those who seek to bring about changes in the present order of things should shrewdly attempt to weaken the historical support. Such a development of an institution by the race is not only regarded but *is* strong presumptive evidence of its importance and value.

[1] Laveleye, De la Propriété, p. 379.

Even Mill, who does not appear until very late to have been affected by the theory of the Teutonic mark,[1] but regarded "the feudal family" as "the last historical form of the patriarchal family,"[2] was so impressed with certain crying evils in the English land system that he speaks of "the bulk of the community" as being "disinherited of their rights."[3] But Mill's views in regard to land holding were based upon other considerations than historical evidence of communal holding of land. Yet he hailed the appearance of the mark theory as an aid in reforming the land system because it would be "a powerful solvent of a large class of conservative prejudices," and because "it opens up the question whether the earlier or the later ideas are better suited to our purpose."[4] It is what Sir Frederick Pollock speaks of as the "absolute and unlimited and ingrained idea of private property in land,"[5] that Mill objects to. His position was that private property did not have its foundation in the nature

[1] In fact the theory is said to have attracted little attention in England until the appearance of Nasse's pamphlet (1871) and Sir Henry Maine's Village Communities (1871).

[2] Mill, Prin. Pol. Econ., Bk. II, ch. 2, § 3.

[3] Ibid. Bk. II, ch. 2, § 6.

[4] See his Review of Maine's Village Communities in the Fortnightly Review, 1871, Vol. I, p. 544.

[5] Land Laws, pp. 15, 16, foot note.

of things, in eternal right, but that it was an invention of man, and like other inventions, even if good, 'must perforce give place to better.' He objects to the political thinkers who "may have been overconfident in their power of deducing systems of social truth from abstract human nature," [1] and he welcomes the village community theory as showing that "property in land has not been, and is not, one simple idea, one conception of rights always the same." [2] He looked upon the village community theory as merely clearing the way for the proposal of any new theory which might promise to better the condition of the race, though he did not personally look forward to the entire abolition of private property in land.[3] Believing as he did that land is essentially different from other kinds of property, and impressed with the evils to society resulting from the existence of great landed estates, he was ready to welcome anything which should weaken the force of the historical precedent for

[1] Fortnightly, 1871, I, 543.

[2] Ibid. p. 549.

[3] M. de Laveleye gives an interesting letter from Mill in which after expressing his interest in Laveleye's work he says, "Mais je ne crois pas que l'on puisse nier que les réformes à faire dans l'institution de la propriété consistent surtout à organiser quelque mode de propriété collective en concurrence avec la propriété individuelle." — Prim. Prop. p. xiii.

landed property, and it is with evident satisfaction that he calls attention to the fact that even "in England, for some time past, the idea of absolute property in land has been sensibly weakened." [1]

The mark theory which asserts the "natural right," as Henry George calls it, of every man to the use of the land, and which denies the right of any to the ownership of land, has been closely connected with the mark theory which is supposed to represent the "natural" form of landholding. In this day when there is a general disposition to sniff at "natural rights" as an effusion of the philosophic brain, the historical support of communism is likely to prove stronger than the philosophical. "I have a property in myself," says a recent writer.[2] "I have the right to be free. All that proceeds from myself, my thoughts, my writings, my works are property; but no man made the land and therefore it is not property." The possibility of carrying into effect such a distinction could be realized more perfectly if it did not seem necessary to embody "all

[1] Fortnightly, 1871, I, 552. Mill had the highest possible respect for vested rights and it was only so far as the future increase in the value of land, due to increasing population, was concerned that he desired its appropriation by the state.

[2] Joseph Fisher, History of Land-holding in England (1875), Intro.

that proceeds from myself" in some material form. Great use is made of the phrase, "The land, like the air is the free gift of Nature," or "the free gift of God to man," — if the one who repeats it chances to be of a religious turn. Well, what is not? Certainly, land is the free gift of God to man, and so is every other natural substance and natural force of which we are cognizant. The soil, the water; wood, iron, stone for shelter; sheep for wool, the cotton plant for cotton; animals and plant life for food; the powers of growth; the physical forces; — all are the free gifts of nature. They not only stand waiting to be used, but if man does not use them he must perish. But to use them one must have undisputed possession of the natural substance upon which his labor is expended in fitting it for use. This is as true of the soil as of the iron or wood, the wool, the horse or the cow. The denial of the possibility of ownership in the one is the denial of the possibility of property in all. A classification of property into movable and immovable, or in a dozen other ways is possible, but a classification into things which are "the free gifts of nature" and those which are not, is not possible. There is no essential difference in the nature of the material basis of the objects of ownership. If it is urged

that the soil is limited in extent, it may be replied that almost all other material substances are more limited, and furthermore that when used they are destroyed forever. If it is meant that all material substances are to be classified under the term land, then not only is it made more difficult for the individual to secure possession of the material upon which his labor must be bestowed, but absolute ownership in anything is rendered impossible; the more limited and destructible the material the more impossible is the idea of ownership.

Whatever may be the philosophical justification of property, or whether it have any or not, it cannot be successfully maintained that there is any sufficient ground for a distinction in ownership in the various kinds of natural agents upon which labor has been expended, and which to a greater or less extent embody it. Even if we were to attempt the niceties of distinction which St. Thomas Aquinas makes between objects "whose use is their consumption" and objects "whose use is not their consumption," we could not get a classification of natural agents, from the enduring iron and the less enduring soil, to the delicate morsel or precious perfume that perishes in the using, which would justify us in saying, "this by 'natural right' may become prop-

erty, and this may not." Property in land has precisely the same philosophic basis as other kinds of property. Say, if you will, that property in slaves had as good a basis; but slavery has not been overthrown by declaring that slavery in the past is an historical myth. No more will property rights be overthrown by such an argument, even if justified.

Nor is the possibility of an "unearned increment" peculiar to land. It is unimportant that such "unearned increment" is, in the normal case, much less frequent than is sometimes supposed.[1] If it ought to go to society at large, then it would be wiser to make objection to the private ownership of "unearned increments," than to the private ownership of land; and other forms of property would furnish abundant instances in which the "unearned increment" might be claimed.

One may see evils in the control of large areas of land by a few individuals, but this can no more be taken as proof of the iniquity of private ownership

[1] Therold Rogers says that he had long ago come to the conclusion that "very possibly the 'unearned increment' of the future was entirely hypothetical and probably visionary, certainly too doubtful to admit of being made the basis of a gigantic operation" — The Economic Interpretation of History, p. 516.

of land *per se*, than the benefits of small peasant proprieties can be made its justification. The evils charged may be good grounds for criticism of the causes which have produced and perpetuated large landed estates; they may be grounds for plans for the easy division, alienation and transfer of landed property; but they are not good grounds for objection to the institution itself. And when the attack upon private property is made to receive its chief support from a supposed form of primitive land-holding, we see the possibilities of the uses to which an historical dogma may be put.

That in the process of the evolution of property, not every kind of property came into existence at the same time, may be taken as a matter of course. That property in land was of much slower development, and could not have preceded permanent settlement, is pretty certain. That the family was the "individual," in all forms of primitive ownership, may be regarded as pretty well established. That property is thus an institution created by man in the course of time can doubtless be maintained successfully. Some forms of property, which now are supposed to find ample justification, such as those guaranteed by patent and copy-rights, are of very late development. They

apparently need no historical justification. And it will be very hard to convince men that individual property does not correspond very closely to the nature and needs of all men; that it has not, in some form, shown itself among all men; that it has not, upon the whole, been a beneficent institution. It will be hard to convince them that property in land is peculiar, and unlike other property. It will be hard to convince them that the Germanic mark occupies such an important place in determining the nature of our institutions, — at least, until there is more evidence for its existence.

The way in which an historical dogma comes to affect all social, political and economic institutions, is a perpetual caution to one who would investigate their origin. Inductions from present observation to past conditions, or from past conditions to present duties, are not to be made hastily, or without large allowances for errors. The hypothesis of the Germanic mark has, no doubt, served a useful purpose as a center around which the study of primitive institutions might gather. It is, perhaps, time to lay it aside as a dogma, and approach the subject from a new standpoint, viz., the unbroken continuity of human life and human institutions.

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INDEX.

Acre strips, 64, 65.
Adams, C. F. 129.
Adams, H. B. 118, 119.
Ager, 32–36.
Ager publicus, 34, 35.
Aidan, Bishop of, 57.
Alamanni, laws of, 44, 45, 47, 48.
Allen, W. F. 38, 57, 71, 76, 77, 82.
Allmende, 43–47, 110.
Allotments, 8.
Ancient demesne, 77, 91.
Andrews, C. M. 99.
Anglo-Saxon charters, 21, 53–55.
Anglo-Saxon Chronicle, 21, 55, 68.
Anglo-Saxon law, 21, 60.
Aquinas, St. Thomas, 152.
Arable mark, 8, 64, 118.
Ariovistus, 39.
Aristotle, 133.
Aryan, 4, 109.
Ashley, W. J. 25, 71, 75, 78, 109, 143.
Augustine, St. 56, 125.

Barones Regis, 69.
Bavarian law, 44.
Bede, 54, 58, 103.
Benefices, 102.
Bible, English, 125.
Birkbeck, W. L. 72, 76, 78, 86.
Black Death, 65, 90.
Boon-days, 65.
Bordarii, 67, 68.
Borough English, 95.
Bracton, 87.
Britons, 105.

Caedwalla, 55.
Caesar, 20, 29, 34, 39, 40.
Castle Combe, 80, 81.
Ceorl, 88.
Channing, E. 116, 128, 130.
Chatti, 32.
Chiefs, 29, 30, 32.
Cicero, 35.
Colonus, 71, 101.
Commarchani, 46.
Commendation, 102.
Common fields, 64.
Common mark, 8, 15, 118.
"Common rights," 97, 137.
Commoner, 10, 134.
Communal character of American settlements, 118, 129, 130, 137.
Communia, 43–47.
Commutation, 75–78, 89.
Consortes, 46.
Continuity of ideas, 107.
Coäration, 104.

Coote, C. C. 102.
Cotarii, 68, 81, 82.
Coulanges, Fustel de, 25, 26, 35, 40–43, 46–48, 50, 101.
Court Baron, 83, 84, 94.
Court Customary, 83, 84.
Cottiers, 65.
Cunningham, W. 40, 103.
Customary tenants, 82.

Danish influence, 105.
Decumate lands, 33.
Demesne, 65, 67.
Democracy of the mark, 10, 82, 134, 137.
Dimidiae Virgatae, 81.
Domesday, 66–69, 78, 81, 82, 94, 124.
Dominicus, 83.
Dominium, 146.

Earle, J. 42, 53, 60, 82, 83, 84.
Edict of Chilperic, 42.
Edward the Confessor, 69.
Egleston, M. 132.
Ellis, H. 67, 68.
Elton, C. 82, 83, 97.
Enclosure Acts, 22, 64.
Engels, Fr. 146.
Equality, 10, 17, 22, 80, 125, 137.
Ethelbert, 21, 52, 53, 57, 71.
Ethnology, 112.
Evolution of property, 154.

Fallei, manor of, 69.
Fenni, 33.
Finis, 42.
Firm, 75, 78.
Fisher, J. 150.
Freemen, 10, 71, 78, 154.
Freeman, E. A. 7, 14, 61.
Frisian Law, 44.
Furlongs, 64.

Geneat land, 70.
General court, 127, 131, 138.
George, Henry, 7, 150.
German law, 40, 43–45.
Germania, 33, 36.
Germans as described by Caesar 39.
Germans as described by Tacitus, 29.
Glanville, 87.
Glasson, E. 27.
Gomme, G. L. 6, 13, 87, 104, 110.
Green, J. R. 7, 10, 13.

Halimote, 87, 94.
Hallam, 60.
Ham; 53.
Hengist, 116, 123, 124.
Hide, 55.
Hilda, Abbess, 54.
Howard, G. E. 115, 118.
Hundred Rolls, 65.
Hutchinson, L. 54.

Indian village community, 109.
Individualism of the mark, 17, 107, 120.
Ine, 71, 115.
Intermixed strips, 97, 98, 104.

Jubainville, 5.
Judicial combat, 44.

Kemble, J. M. 1, 3, 9, 10, 11, 53. 56, 59, 60, 135.
Kinship, 12.
Kovalevsky, M. 5, 47–49.

Labor services of villains, 76, 90.
L'Alleu et le domain rural, 27.
Land-marks, 45.
Land in villainage, 67, 70.
Land, the gift of nature, 151.
Laveleye, Emilede, 5, 9, 146, 149.
Legal evidence, 86, 88–92.
Libere tenentes, 65, 66, 75.
Liberi, 66, 80, 82.
Life principle of the village community, 135.

Maine, Sir H. 4, 9, 10, 11, 12, 13, 14, 18, 104.
Maitland, F. W. 83, 92, 94.
Manorial courts, 83, 84, 87, 92, 93.
Manorial element of New England settlements, 139.
Marca, 42, 43.
Marches, 42.
Mark, 8, 40, 41, 43, 45.
Marriage of a daughter, 65, 66.
Marx, Karl, 146.
Massachusetts Bay Company, 127, 131.
Maurer, G. von, 2, 3, 4, 8, 11, 21, 24, 34, 35, 44, 45, 46, 50, 59.
Melbroc, manor of, 78.
Military character of Saxon settlement, 84, 85, 86.
Mill, J. S. 7, 145, 148, 150.
Mill, obligation of tenant to use lord's, 65, 66.
Mir, 5, 110.
Monday-men, 81, 82.
Montague, Professor, 109.
Morier, R. B. D. 8, 9, 12, 13.
Mourt's relation, 119.

Nasse, E. 3, 4, 5, 15.
Nativi, 81.
Natural agents, 151, 152.
"Natural rights," 125, 150, 152.
Norman Conquest, 14, 18, 90, 93.
Norman Influence, 106.

Open fields, 64, 70, 97, 98, 104.
Organized colonization, 138.
Osgood, H. L. 123.
Oswy, 54.
Ox, sale of by villain, 60.

Palgrave, Sir F. 59, 60.
Patria potestas, 11.
Patriarchal system, 5, 12, 18, 148.
Per annos, 36, 37.
Plymouth settlement, 119–121.
Pollock, Sir F. 60, 148.
Population, 67, 68.
Precariae, 65.
Private Property among the Germans, 35.
Property in land the result of robbery, 143–4.
Proprietors, 133, 134.

Rectitudines Singularum Personarum, 70, 74, 75, 76.
Remains, 62.
Resumption of land as communal property, 142–144.

Ripuarian law, 45, 47.
Rogers, Thorold, 153.
Roman Influence, 27, 90, 105, 123, 125.
Roman law, influence of, 90, 125.
Roman Villa, 83, 101.
Ross, D. W. 36, 48, 51.
Rotuli Hundredorum, 65, 77.

Salem settlement, 120, 121.
Salic law, 44, 45, 96, 102.
Saxon Conquest, 102.
Scarth, H. M. 103.
Scrope, G. Poullet, 80.
Seebohm, F. 25, 63, 66, 70, 80, 84, 101, 104.
Serfdom among the Germans, 30, 31.
Servi, 67, 68, 75, 81.
Services of villains, 66.
Shots, 64.
Skene, W. F. 104.
Sochmanni, 67, 68, 75.
Status of the villain, 67, 88, 90.
Stubbs, W. 7, 101.

Tacitus, 20, 29, 40, 58, 73, 86, 120, 121, 122.
Terminus, 41, 42, 44.
Terminology, 118.
Thanes, 69.
Theow, 71.
Thorpe, B. 41, 60.
Thuringian law, 44.
Traditiones, 50.
Tribal conditions, 104–105.
Tributarii, 54.
Tun, 53, 115, 119, 120, 121.

Unearned increment, 153.

Villani, 65, 67, 68, 88.
Village Mark, 15, 118, 120.
Villata, 78.
Vinogradoff, Paul, 77, 84, 87, 88, 90, 94, 95, 96, 98.
Viollet, 5.
Virgatae, 81.
Virgate, 65, 67.
Visigothic law, 44.

Week-work, 65, 76.
Wergild, 58.
Whitraed, 115.
Winslow Manor Rolls, 65.
Wyclif, 125.

Yardlands, 65, 71.

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